Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOSEPH A. VENTO,

Petitioner

v.

COLORADO NATIONAL BANK; C. JEAN STEWART; DAVID W. STARK; AND JACK M. MERRITTS,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a federal court may apply a "heightened pleading standard" – more stringent than the usual pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure – in a suit alleging liability under 42 U.S.C. §1983 against a state probate judge, a national bank and two private attorneys.

2. Whether a state probate judge assuming jurisdiction of an interpleader action in her probate court and ordering interpleader is absolutely immune from liability in an action brought against her in her individual capacity under 42 U.S.C. §1983.

3. Whether, under the facts of this case, those respondents who are private parties may be appropriately characterized as "state actors".

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceeding in the United States Court of Appeals for the Tenth Circuit.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Joseph A. Vento, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on May 19, 1999.

OPINIONS BELOW

The opinion of the Court of Appeals whose order and judgment is herein sought to be reviewed was entered on May 19, 1999 in Case No. 98-1236, is unpublished, and is reprinted in the appendix to this Petition, pp. 20-24. The prior opinion of the United States District Court for the District of Colorado was entered on June 4, 1998, in Case No. 97-S-463, is unpublished and is reprinted in the appendix to this Petition, pp. 25-29.

STATEMENT OF JURISDICTION

The Order and Judgment of the United States Court of Appeals for the Tenth Circuit to be reviewed was entered on May 19, 1999.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

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STATEMENT OF THE CASE

This is a civil rights action brought by petitioner Joseph A. Vento, an attorney, in the United States District Court for the District of Colorado (Federal District Court), Civil Action No. 97-S-463, pursuant to 42 U.S.C. §1983 on March 7, 1997.

The Action

Petitioner's complaint in the Federal District Court (Appendix pp. 41-55) alleges in one count that the private respondents participated with the respondent C. Jean Stewart (Judge Stewart) in acts prohibited under §42 U.S.C. §1983 by initiating an interpleader proceeding in the Denver probate court resulting in respondent Judge Stewart issuing an Order on Interpleader Petition (Appendix pp. 30-32) causing petitioner to be deprived of his property without due process of law.

In another count in his complaint, petitioner alleges that the respondents conspired with one another to produce the same acts and results as set forth on the next preceding paragraph.

In the Federal District Court the only pleading that has been filed is the complaint by the petitioner. The respondents have filed motions to dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, and respondent Colorado National Bank also filed a motion for summary judgment alternatively with its motion to dismiss. Rule 12(b)(1) provides the pleader may assert by motion the defense of "lack of jurisdiction over the subject matter". Rule 12(b)(6) provides the pleader may assert by motion the defense of "failure to state a claim upon which relief can be granted".

On June 4, 1998, the Federal District Court ordered the complaint dismissed for the following reasons: (1) because respondent Judge Stewart did not act in the clear absence of all jurisdiction, she is entitled to absolute immunity from petitioner's claims; and (2) private lawyers do not act under color of state law simply by engaging in private litigation on behalf of their clients and the meager facts alleged in the complaint, even if true, do not state a claim that the private respondents engaged in a conspiracy with respondent Judge

Stewart to deprive the petitioner of his rights. (Appendix pp. 25-29)

The United States Court of Appeals for the Tenth Circuit (Court of Appeals) on May 19, 1999, affirmed the judgment of the Federal District Court dismissing the complaint.

The Court of Appeals made a finding that since the Denver probate court had jurisdiction over "every legal and equitable question arising out of or in connection with express trusts" (Colo. Rev. Stat. 13-9-103(5)), Judge Stewart had, therefore, at least colorable jurisdiction sufficient to invoke judicial immunity. The Court of Appeals made no finding as to how express trusts are involved in this case.

The Court of Appeals also set forth its criteria as to how the petitioner must state a claim for relief under 42 U.S.C. §1983. (Appendix pp. 23-24)

One of the issues before the Court of Appeals was that respondents acted to deprive the petitioner of his property without due process of law in the interpleader proceedings in the Denver probate court. The Court of Appeals addressed this matter by holding that petitioner's arguments demonstrated only a disagreement with the state court's decisions and therefore invoked the *Rooker-Feldman* doctrine. (Appendix p. 24)

The Facts

Judgments were entered on June 15, 1993, in favor of petitioner and his sister Cecilia DeFellippie, now deceased, against a subsidiary and predecessor of respondent Colorado National Bank in an action filed on September 3, 1987, in the Pueblo County district court, Case No. 87CV867. The judgments were appealed to the Colorado Court of Appeals where they were affirmed. Thereafter on December 11, 1995, the Colorado Supreme Court denied certiorari.

On December 29, 1995, the respondent Colorado National Bank filed a complaint for interpleader and injunctive relief in the Denver probate court, Case No. 95PR2379, interpleading the amounts of the judgments of June 15, 1993, referred to in the next above paragraph. (Appendix, pp. 56-61). The parties in the Denver probate court were: *Colorado National Bank, Plaintiff v. Joseph A. Vento, Linda Saunders, Personal Representative of the Estate of Cecilia DeFellippie, Irene C. Coulter, Richard G. Vento, Angelina Vento, Marihelen Vento and Wesley C. Kettelkamp, Jr., Defendants.* The Denver probate court only has one judge who at that time was, and still is, respondent Judge Stewart.

The respondent Colorado National Bank set a hearing for 10:30 a.m. on January 3, 1996, seeking an order for interpleader in the interpleader action. Notice to the petitioner of that hearing together with a summons and copy of the complaint in the interpleader action in the Denver probate court were served on petitioner at his home in Pueblo, Colorado, which is more than 100 miles from Denver, at 7:45 a.m. on January 3, 1996, the same day as the hearing.

The petitioner called his Denver attorneys and asked them to appear at that 10:30 a.m. hearing on January 3, 1996, on his behalf. Upon appearing for petitioner at that hearing, petitioner's attorneys requested a continuance which request was denied. After a non-evidentiary hearing that lasted for about one and one-half hours, respondent Judge Stewart entered an Order on Interpleader Petition (Appendix, pp. 30-32) which held, *inter alia,* that respondent Colorado National Bank shall be considered to have satisfied the judgment obtained against it in Case No. 87CV867 in the district court in Pueblo County, Colorado. At that time on January 3, 1996, when the respondent Judge Stewart ordered interpleader, the only pleading that had been filed was the complaint for interpleader and injunctive relief filed by the Colorado National Bank. No answers to the complaint nor defensive motions had been filed.

On January 5, 1996, The Colorado Court of Appeals in Case No. 93CA1375 issued its mandate ordering the judgment affirmed in case No. 87CV867 entered on June 15, 1993 in the Pueblo County district court.

After January 3, 1996, the respondent Colorado National Bank paid no interest on those judgments obtained against it on June 15, 1993, in the Pueblo County district court. Colorado Revised Statutes 5-12-106 provides that interest on an appealed judgment shall be payable until satisfaction of the judgment. (Appendix, pp. 34-35)

On March 7, 1997, the petitioner filed the present action in the United States District Court for the District of Colorado, Civil Action No. 97-S-463.

Basis for Federal Jurisdiction in the Court of First Instance

Jurisdiction of the United States District Court for the District of Colorado was invoked under the provisions of sections 1983 and 1988 of Title 42 of the United States Code.

REASONS FOR GRANTING WRIT

A Federal Court May Not Apply a "Heightened Pleading Standard" in a Civil Rights Claim Against a State Probate Judge and Private Parties

Certiorari should be granted to resolve conflicting decisions in the lower courts concerning the applicability of heightened pleading standards to §1983 actions. The judgment below is inconsistent with the rulings of other United States Courts of Appeal. In *Kimes v. Stone*, 84 F.3d 1121, 1129 (9th Cir. 1996) and *Housley v. United States*, 35 F.3d 400 (9th Cir. 1994), these courts have adopted the view that *Leatherman v. Tarrant County Etc.*, 507 U.S. 163, 113

S.Ct. 1160, 122 L.Ed.2d 517 (1993) ought to mark the absolute end of the "heightened pleading" requirement. In contrast, some circuit courts limit *Leatherman*, to municipal liability cases and have continued to apply heightened pleading requirements to §1983 complaints as the Court of Appeals did in this case.

All the Federal Rules of Civil Procedure under Rule 8(a) require is a "short and plain statement of the claim showing that the pleader is entitled to relief', giving the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80, 85 (1957*); Leatherman v. Tarrant County Etc.*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517, 524 (1993). In all respects the normal federal pleading standards apply to civil rights. *Bounds v. Smith*, 430 U.S. 817, 917 S.Ct. 1491, 52 L.Ed.2d 72 (1977).

In *Leatherman v. Tarrant County Etc.*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993) this Court cautioned that civil rights claims are to be subject only to normal standards of pleading. (T)he "heightened pleading standard" is just what it purports to be: a more demanding rule for pleading a complaint under §1983 than for pleading other kinds of claims for relief." This Court's decision in *Leatherman* thus employs a strict reading of Rule 8 (and 9) of the Federal Rules of Civil Procedure that suggests strongly that any heightened pleading standard is impossible to square with the Federal Rules of Civil Procedure and is therefore invalid and is not permissible.

The petitioner sets forth three counts in his complaint in the Federal District Court, each alleging a separate claim for relief. Count I alleges a claim for relief in which a private entity and private individuals engage, act jointly, and participate with the respondent state probate judge, C. Jean Stewart in the challenged action, causing injury to petitioner. (Appendix, pp. 41-52). Count II alleges a claim for relief for

conspiracy. (Appendix, pp. 52-53). And Count III seeks punitive or exemplary damages. (Appendix, p. 53).

Allegations in the complaint filed in the Federal District Court on March 7, 1997, which satisfy the requirements of Rule 8(a) of the Federal Rules of Civil Procedure are:

(1) That this is an action to redress the deprivation by the respondents of the rights of the petitioner secured by the Constitution and laws of the United States.

(2) The respondents were acting under color of state law during all times mentioned in the complaint.

(3) The actions of the respondents through the probate court violated the rights of the petitioner under the Fourteenth Amendment to the United States Constitution and Title 42 U.S.C. §1983.

(4) The respondents jointly engaged in acts prohibited under 42 U.S.C. §1983 and acted together producing a constitutional wrong depriving him of his property interest protected by the Constitution without due process of law.

(5) The respondents conspired with one another in getting and issuing an interpleader order which constituted a wrong to the petitioner by depriving him of his property without appropriate process.

To survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure – failure to state a claim upon which relief can be granted – the petitioner need only allege that he has a cause of action under 42 U.S.C. §1983 because the respondents, acting under color of law, deprived him of property secured by the Constitution and laws of the United States. In reviewing a decision granting a motion to dismiss, the factual allegations of the complaint must be accepted as true. *Leatherman v. Tarrant County Etc.*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517, 522 (1993).

In *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) this Court ruled that allegations of facts constituting a deprivation under color of state authority of a

right guaranteed by the Fourteenth Amendment satisfy to that extent the requirements of the civil rights statute embodied in 42 U.S.C. §1983.

Petitioner's complaint in the Federal District Court adequately pleads facts to state a claim for relief. The allegations in the complaint satisfy the provisions of Rule 8(a)(2) of the Federal Rules of Civil Procedure, which only requires "a short and plain statement of the claim showing that the pleader is entitled to relief..."

The Federal District Court below ordered the complaint dismissed for the following reasons which, if followed and are required, would heighten the pleading standards under the Federal Rules of Civil Procedure.

> (Petitioner) continues to merely assert conclusory allegations that Judge Stewart lacked jurisdiction. (Petitioner) fails to understand that the interpleader action was brought in the Denver Probate Court because the money owed as a result of the Pueblo District Court judgment belonged to an express trust. Because Defendant Stewart did not act in the clear absence of all jurisdiction, she is entitled to absolute immunity from (Petitioner's) claims...private lawyers do not act under color of state law simply by engaging in private litigation on behalf of their clients...the meager facts alleged in the complaint, even if true, do not state a claim that these private parties engaged in a conspiracy with Defendant Stewart to deprive Petitioner of his rights. (Appendix p. 27)

The Court of Appeals affirmed the judgment of the Federal District Court dismissing the complaint.

The Court of Appeals set forth its criteria as to how the petitioners must state a claim for relief under 42 U.S.C. §1983 as follows: 1) Petitioner must show that the respondents acted under color of law; 2) conclusory allegations of

conspiracy are insufficient; and 3) petitioner must demonstrate a conspiracy between the private respondents and a state actor. The Court of Appeals, using a heightened pleading standard, found that Petitioner did not meet these criteria and, therefore, did not state a claim under §1983. (Appendix pp 23-24)

By virtue of the foregoing holdings, the Court of Appeals applied a "heightened pleading standard" – more stringent than the usual pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure.

The Respondent State Probate Court Judge, C. Jean Stewart, is Not Absolutely Immune From Liability.

The Court of Appeals made a finding that the Denver probate court had "at least colorable" jurisdiction over the interpleader action because under Colo. Rev. Stat. 13-9-103(5), jurisdiction is granted to the Denver probate court over "every legal and equitable question arising out of or in connection with express trusts" and is sufficient to invoke judicial immunity. In so holding , neither the Federal District Court nor the Court of Appeals made any finding as to how express trusts are involved in the case. (Appendix pp. 22-23, 27)

In general, the doctrine of judicial immunity may be invoked with respect to suits for damages against a judicial officer. *Mireles v. Waco*, 502 U.S. 9, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991). An exception exists to the general rule of judicial immunity from liability for damages with respect to actions taken which are not taken within a judge's judicial jurisdiction. A judge's immunity is dependent on the challenged conduct being an official act within his statutory jurisdiction, broadly construed. *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980). In *Stump v. Sparkman*, 435 U.S. 349, 356, 98 S.Ct. 1099, 55 L.Ed.2d 331, 339 (1978), this Court held that,

> "...the necessary inquiry in determining whether a defendant judge is immune from suit is whether at the time he took the challenged action he had jurisdiction over the subject matter before him, and he will be subject to liability only when he has acted in the clear absence of all jurisdiction."

The Court stated in *Randall v. Brigham*, 74 U.S. 523, 19 L.Ed. 285 (1869) that judges of limited authority were protected only when they acted within their jurisdiction. To the same effect is *Bradley v. Fisher*, 80 U.S. 335, 20 L.Ed. 646 (1872) as follows,

> "Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known, no excuse is permissible."

The Denver probate court did not have jurisdiction over the interpleader suit filed in that court and respondent Judge Stewart acted without subject matter jurisdiction when she granted the Order on Interpleader Petition on January 3, 1996 (Appendix, pp. 30-32). Sections 13-9-101 through 13-9-103 of the Colorado Revised Statutes 1997 (Appendix, pp. 35-39), and section 9(3) of Article VI of the Colorado Constitution (Appendix, p. 33) show that the Denver probate court is a court of limited jurisdiction with subject matter jurisdiction to determine legal and equitable questions in connection with estates, probate matters, and wills and trusts only. Chief Justice Rehnquist dissenting in *Tulsa Professional Collection Services v. Pope*, 485 U.S. 490, 108 S.Ct. 1340, 1348, 99 L.Ed.2d 565 (1988) wrote,

> "...Probate proceedings have been traditionally uncontested and administrative, designed to transfer assets from someone who has died to his successor ... Occasionally there may be a disputed claim against the estate which is

then in most jurisdictions like any other civil suit."

The U.S. District Court found that respondent Judge Stewart did not act in the absence of all jurisdiction for the reason that

> "Plaintiff (petitioner) fails to understand that the interpleader action was brought in the Denver probated court because the money owed as a result of the Pueblo District Court judgment belonged to an express trust" (Appendix, p. 27).

This finding is factually incorrect because the money owed as a result of the Pueblo County district court judgment belonged to petitioner and his sister as individuals and not to an express trust. The United States Court of Appeals for the Tenth Circuit (Court of Appeals) recognized this in its Order and Judgment dated May 19, 1999 as follows, "In 1993, plaintiff (petitioner) and his sister obtained a judgment against CNB (Colorado National Bank) in the District Court in Pueblo County, Colorado." (Appendix, p. 21) The respondent Colorado National Bank recognized this in paragraphs 1 and 14 of its Compliant for Interpleader and Injunctive Relief in the Denver probate court (Appendix pp. 56-61). Paragraphs 2 through 6 of that complaint are superfluous and irrelevant in that being a beneficiary of trust has nothing to do with this case, nor does the fact that CNB (Colorado National Bank) is a party in a another action involving a trust have anything to do with this case.

The Court of Appeals determined that it did not have to act on the issue raised in that court that the Denver probate judge did not have jurisdiction over the interpleader action hearing on January 3, 1996. Instead, the Court of Appeals made a finding that the Denver probate court had jurisdiction over the interpleader action because under Colo. Rev. Stat. §13-9-103(5) jurisdiction is granted to the Denver probate court over "every legal and equitable question arising out of or in connection with express trusts," so Judge Stewart had at

least colorable jurisdiction sufficient to invoke judicial immunity. (Appendix, pp. 22-23). The Court of Appeals made no finding as to how express trusts are involved. However, the Court of Appeals made an erroneous finding that the competing claims on the judgment in the interpleader action included claims by trusts owned by the other members of plaintiff's family. (Appendix p. 21)

Furthermore, there is no jurisdiction under the Colorado Rules of Civil Procedure for interpleader actions in the Denver probate court. Rule 22(2) of the Colorado Rules of Civil Procedure (Appendix, p. 40) provides in part, "In any civil action of interpleader,...(s)uch district court shall hear and determine the case ..." No subject matter jurisdiction is given to the Denver probate court under that Rule 22.

On January 3, 1996, the Denver probate court and respondent Judge Stewart also lacked jurisdiction because jurisdiction over the matters involved in Case No. 95PR2379 begun on December 29, 1995, in the Denver probate court still rested in the Colorado Court of Appeals or the Pueblo County district court. The Colorado Court of Appeals in Case No. 93CA1375 issued its mandate on January 5, 1996, ordering the judgment affirmed in Case No. 87CV867 in the Pueblo County district court, and thus the Colorado Court of Appeals relinquished its appellate jurisdiction on January 5, 1996, seven days after the date of the commencement of the interpleader action in the Denver probate court on December 29, 1995.

Probate courts are courts of limited jurisdiction and have only that jurisdiction which is expressly given by statute, and neither the probate judge nor the probate court can have any greater authority than conferred by statute.

The Private Parties Acted Under Color of State Law and Were, Therefore, State Actors.

The Court of Appeals in its Order and Judgment (Appendix pp. 20-24) states that the petitioner brought suit against respondents on a conspiracy theory, which is set forth in Count II of the complaint. This statement overlooks the fact that in Count I of the complaint the petitioner sets forth alternatively and separately that the private respondents jointly engaged with, participated in and acted together with respondent Judge Stewart in depriving petitioner of his property without due process of law. Rule 8(e)(2) of the Federal Rules of Civil Procedure (Appendix p. 39) provides that a party may set forth two or more statements of a claim alternatively either in one count or in separate counts. Rule 8(e)(2) also provides that when two or more statements are made in the alternative and one of them if made independently would be sufficient the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. Both the Federal District Court and the Court of Appeals ruled only on the conspiracy count, stating nothing about the sufficiency or insufficiency of the other claim set forth in Count I of the complaint.

The Court of Appeals held that to state a claim under §1983 petitioner must show that respondents acted under color of state law. To the contrary, all that Rule 8(a) of the Federal Rules of Civil Procedure requires is for petitioners to allege that respondents acted under color of state law in order to state a claim under 42 U.S.C. §1983.

Private individuals in a proper case can be held liable under §1983. "Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of §1983 actions." *Dennis v. Sparks*, 499 U.S. 24, 27-28, 101 S.Ct. 183, 186, 66 L.Ed.2d 185, 189 (1980); *United States v. Price*, 380 U.S. 784, 794, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966). In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), a

private party's invocation of state prejudgment attachment by a public official of a debtor's property constitutes joint action subjecting the private party to a §1983 suit, and the constitutional requirements of due process apply to such procedures.

Involved in this case are the private parties putting the property of petitioner into the custody of the law through an interpleader proceeding to be acted upon by the respondent Judge Stewart and taking it away from and removing it from the reach of the petitioner. "When private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478, 486, 108 S.Ct. 1340, 1345, 99 L.Ed.2d 565 (1988). In this case, the interpleader action effectively operated as a prejudgment attachment by taking the property of petitioner (the judgment, or the amount thereof) into the custody of the court to be held for purposes of satisfying unlitigated claims against petitioner.

The requisite state action or color of state law is based upon private persons acting together with and being jointly engaged with state officials in the challenged action. The conduct allegedly causing the deprivation of a federal right has to be fairly attributable to the State. The deprivation must be caused by the exercise of some right or privilege created by the State – Rule 22 (interpleader) of the Colorado Rules of Civil Procedure – or by a person for whom the State is responsible – the respondent probate court judge, C. Jean Stewart. Secondly, the party charged with the deprivation must be a person who may fairly be said to be a state actor – in this case the respondent probate court judge, C. Jean Stewart – or because he has acted together with state officials. Here, the three private respondents acted together with the respondent probate judge, C. Jean Stewart – a person for whom the State is responsible - in the challenged action, the interpleader order, and under a right or privilege created by the State – Rule 22 of the Colorado Rules of Civil

Procedure. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982).

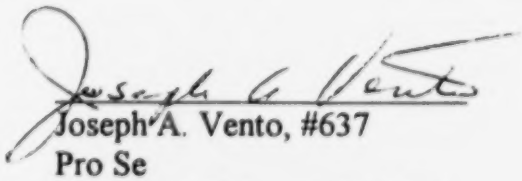
With respect to conspiracy, when two or more persons conspire to violate the civil rights of an individual, acting under of state law, if one or more of the conspirators is a state officer, then the mere fact that certain of the other conspirators are not state officers constitutes no defense to any of them under the Civil Rights statutes. *Hoffman v. Holden*, 268 F.2d 280, 299 (9th Cir. 1959) In the case at hand, the state officer is the respondent Judge Stewart.

Petitioner's complaint (Appendix pp. 41-55) describes the challenged procedures used by the respondents in obtaining the Order on Interpleader Petition on January 3, 1996, in the interpleader action in the Denver probate court showing the sequence of events depriving him of his property without due process of law.

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that his petition for a writ of certiorari be granted.

Dated: August 10, 1999 Respectfully submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOSEPH A. VENTO,

Plaintiff-Appellant,

v.

COLORADO NATIONAL BANK; C. JEAN STEWART; DAVID W. STARK; JACK M. MERRITTS,

Defendants-Appellees.

No. 98-1236
(D.C. No. 97-S-463)
(D. Colo.)

ORDER AND JUDGMENT*

Before BRORBY, EBEL, and BRISCOE, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff Joseph A. Vento appeals from the district court's order adopting the magistrate judge's recommendation to dismiss his complaint brought pursuant to 42 U.S.C. §§ 1983 & 1988.[1] We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

Plaintiff brought suit in federal court against defendants, Colorado National Bank (CNB), Stark and Merritts, alleging that they conspired with defendant Stewart, a Denver Probate Court judge, to file a vexatious interpleader action in the Denver Probate Court. In 1993, plaintiff and his sister obtained a judgment against CNB in the District Court in Pueblo County, Colorado. The Colorado Court of Appeals affirmed the judgment on appeal. See Vento v. Colorado Nat'l Bank-Pueblo, 907 P.2d 642 (Colo. Ct. App. 1995). On December 11, 1995, the Colorado Supreme Court denied certiorari. On December 29, 1995, CNB filed the interpleader action seeking to interplead the amount of the Pueblo District Court judgment because of competing claims on the judgment, including claims by trusts owned by other members of plaintiff's family. Plaintiff claims the interpleader action was filed to prevent him from collecting the Pueblo District Court judgment. Defendant Stewart, acting in her capacity as a Denver Probate Court judge, entered an order on January 3, 1996, granting CNB's request to interplead the funds and enjoining all claimants, including Joseph Vento, from taking any action to collect the Pueblo District Court judgment.

Plaintiff then filed this lawsuit alleging his federal civil rights were violated by CNB, defendant Stark (the attorney who represented CNB in the interpleader action), defendant Merritts (the attorney who represented other claimants on the

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1. By order dated September 29, 1998, the appeal from the district court's award of sanctions and attorney fees was dismissed.

Pueblo District Court judgment), and defendant Stewart (the Denver Probate Court judge assigned to the interpleader action).

We review de novo an order dismissing a complaint for failure to state a claim for relief under Rule 12(b)(6) of the Federal Rules of Civil Procedure, using the same standard applied by the district court. See Ordinance 59 Ass'n v. United States Dept of Interior Secretary, 163 F.3d 1150, 1152 (10th Cir. 1998). "We accept as true all well-pleaded facts, as distinguished from conclusory allegations, and view those facts in the light most favorable to the nonmoving party." Maher v. Durango Metals, Inc., 144 F.3d 1302, 1304 (10th Cir. 1998). Dismissal of a complaint pursuant to Rule 12(b)(6) will be upheld only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted).

Plaintiff's claims against Judge Stewart, a state court judge, raise the issue of judicial immunity. "[A] state judge is absolutely immune from §1983 liability except when the judge acts 'in the clear absence of all jurisdiction.'" Hunt v. Bennett, 17 F.3d 1263, 1266 (10th Cir. 1994) (quoting Stump v. Sparkman, 435 U.S. 349, 356-57 (1978)). Plaintiff maintains that the Denver Probate Court had no jurisdiction over the interpleader action, relying on Rule 22 of the Colorado Rules of Civil Procedure and other rules. "[T]he scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge." Stump, 435 U.S. at 356. Neither a judge's "commission of grave procedural errors," id., at 359, nor her action "in excess of [her] authority," id. at 356, will deprive the judge of immunity. A judge acts in the clear absence of all jurisdiction when she "acts clearly without any colorable claim of jurisdiction." Snell v. Tunnell, 920 F.2d 673, 686 (10th Cir. 1990). We need not decide whether the Denver Probate Court had jurisdiction over the interpleader action because we

find that under Colo. Rev. Stat. § 13-9-103(5), granting jurisdiction to the Denver Probate Court over "every legal and equitable question arising out of or in connection with express trusts," Judge Stewart had at least colorable jurisdiction sufficient to invoke judicial immunity. Therefore, Judge Stewart cannot be held liable under §1983.

To state a claim under §1983 plaintiff must show that defendants acted under color of state law. See Haines v. Fisher, 82 F.3d 1503, 1508 (10th Cir. 1996).

Plaintiff recognizes that CNB, Stark and Merritts are private parties, not public actors subject to liability under §1983, but he alleges that they acted under color of state law by engaging in joint activity and/or a conspiracy with Judge Stewart who is a state actor, to violate his rights. "[T]he immunity of a state official will not necessarily protect a private individual alleged to have conspired with [her]." Shaffer v. Cook, 634 F.2d 1259, 1260 (10th Cir. 1980). The test is whether "the plaintiff [has] demonstrated the existence of a significant nexus or entanglement between the absolutely immune State official and the private part[ies] in relation to the steps taken by each to fulfill the objects of their conspiracy[.]" Norton v. Liddel, 620 F.2d 1375, 1380 (10th Cir. 1980).

Plaintiff alleges that the following circumstances demonstrate that the private party defendants and Judge Stewart conspired to violate his rights: plaintiff was not granted a continuance of the January 3, 1996 hearing, he was not given sufficient time to respond to the complaint, and Judge Stewart made statements and rulings with which he disagreed. We hold that these "[c]onclusory allegations of conspiracy are insufficient to state a valid §1983 claim," Hunt, 17 F.3d at 1266 (quotation omitted), and that they do not "allege the kind of conspiratorial nexus" to support a "conspiracy intended to deprive [plaintiff] of his constitutional rights." Shaffer, 634 F.2d at 1261. Because plaintiff has failed to demonstrate a conspiracy between the private party

defendants and a state actor, their conduct is not covered by §1983.

Plaintiff's final argument is framed as a claim that he was deprived of his property through state action without due process of law. Even if plaintiff was deprived of his property, see Vento v. Colorado Nat'l Bank, No. 97CA1814, 1999 WL 46924 (Colo. Ct. App. Feb. 4, 1999) (noting that Denver Probate Court held that plaintiff was entitled to receive approximately $2.9 million from the interpled funds), his arguments to this court demonstrate only a disagreement with the stale court's decisions. Therefore, we invoke the Rooker-Feldman doctrine, which prohibits federal district courts from hearing federal claims whose only purpose is to obtain review of state court judgments when review should be achieved through appellate review in the state court system. See Kiowa Indian Tribe v. Hoover, 150 F.3d 1163, 1165 (10th Cir. 1998).

The judgment of the district court is AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

/s/
Mary Beck Briscoe
Circuit Judge

(Filed May 19, 1999)

APPENDIX B-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel B. Sparr

Civil Action No. 97-S-463

JOSEPH A. VENTO,
Plaintiff,

V.

COLORADO NATIONAL BANK; C. JEAN STEWART; DAVID W. STARK; and JACK M. MERRITTS,
Defendants.

ORDER

THIS MATTER comes before the court on the Recommendation of United States Magistrate Judge that:

(1) Defendant Jack M. Merritts' Motion to Dismiss (filed April 1, 1997) be granted;
(2) Defendants Colorado National Bank's and David W. Stark's Motion to Dismiss or, In the Alternative, for Summary Judgment (filed April 22, 1997) be granted;
(3) Defendant C. Jean Stewart's Motion to Dismiss (filed June 17, 1997) be granted;
(4) This civil action be dismissed with prejudice;
(5) Defendants Colorado National Bank's and David W. Stark's Motion for Sanctions under Fed.
R. Civ. P. 11 (filed April 29 1997) be granted;

(6) Defendant Jack M. Merritts' request for costs, including reasonable attorney fees (made April 1, 1997), be granted;
(7) Defendant Stewart's request for costs and attorney fees (made June 17, 1997) be denied;
(8) Defendants Colorado National Bank's and David W. Stark's Motion for Injunction Prohibiting Joseph Vento from Filing Additional Complaints Against David W. Stark, Colorado National Bank, or Any of Their Agents or Attorneys Without Leave of Court (filed April 22, 1997) be denied;
(9) Defendant C. Jean Stewart's Motion to Stay Discovery (filed June 17, 1997) be deemed moot; and
(10) Plaintiff Vento's request for attorney fees for responding to the Motion for Injunction (made May 21, 1997) be denied.

The Recommendation was issued on April 28, 1998 and served by mail on April 28, 1998. On May 7, 1998, Plaintiff filed his Objection to the Recommendation. On May 15, 1998, Defendant C. Jean Stewart filed her Response to Plaintiffs Objections. On May 18, 1998, Defendants Colorado National Bank and David W. Stark filed their Response to Plaintiff's Objections. The court must make a *de novo* determination of those portions of the proposed findings or recommendations to which specific objection is made. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). The court has reviewed, *inter alia*, the motions, Plaintiff's responses (filed April 21, 1997, May 12, 1997, May 21, 1997, and July 7, 1997), Defendants Colorado National Bank's and Stark's reply (filed May 30, 1997) and supplement (filed July 3, 1997), the complaint, and the applicable law and is fully advised in the premises. Upon *de novo* review of the proposed findings and recommendations, the court agrees with the Recommendation in its entirety.

First, as to the recommended dismissal of all claims against Defendant Stewart, "a state judge is absolutely immune from §1983 liability except when the judge acts 'in the clear absence of all jurisdiction.'" *Hunt v. Bennett*, 17 F.3d 1263, 1266 (10th Cir. 1994) (quoting *Stump v Spark-*

man, 435 U.S. 349. 356-57 (1978)). Plaintiff continues to merely assert conclusory allegations that Judge Stewart lacked jurisdiction. Plaintiff fails to understand that the interpleader action was brought in the Denver Probate Court because the money owed as a result of the Pueblo District Court judgment belonged to an express trust. Because Defendant Stewart did not act in the clear absence of all jurisdiction, she is entitled to absolute immunity from Plaintiff's claims based on her rulings and orders In the interpleader action before the Denver Probate Court. Plaintiff's complaint must be dismissed as to Defendant Stewart.

Next, Plaintiff continues to assert that private party Defendants Colorado National Bank, Stark, and Merritts acted under color of state law for purposes of §1983. Paragraph 23 of the complaint alleges that the Defendants conspired by the mere filing of the interpleader action in the Denver Probate Court and Judge Stewart's January 3, 1996 Order on Interpleader Action. Plaintiff then quotes from the transcript of the January 3, 1996 hearing at paragraph 25 of the complaint. However, "private lawyers do not act under color of state law simply by engaging in private litigation on behalf of their clients." Recommendation at p. 6 (citation omitted). The court agrees with the Recommendation that the meager facts alleged in the complaint, even if true, do not state a claim that these private parties engaged in a conspiracy with Defendant Stewart to deprive Plaintiff of his rights. Plaintiff's complaint must be dismissed as to Defendants Colorado National Batik, Stark, and Merritts.

Next, Plaintiff objects to the Magistrate Judge's statement of the facts. Upon review, the court is satisfied that the Magistrate Judge did not materially misstate Plaintiff's factual allegations and that the Magistrate Judge applied the appropriate standard of review for a motion to dismiss. Based on the factual allegations in the complaint, the Magistrate

Judge properly concluded that Plaintiff has not stated any legal claim for relief.

Finally, Plaintiff objects to the Recommendation that Defendants Colorado National Bank and Stark be awarded attorney fees and expenses under Fed. R. Civ. P. 11 and that Defendant Merritts be awarded costs, including reasonable attorney fees, pursuant to 42 U.S.C. § 1988. Plaintiff asserts that "the complaint and briefing in this case shows [sic] that it was not brought without a great deal of research and thought." To the contrary, research and/or thought by Plaintiff, a licensed attorney, would have revealed that:

> [t]he uniform case law in this Circuit and throughout the United States is that private attorneys and litigants in a civil suit do not act under color of state law. Furthermore, it has been settled law for decades that a claim of conspiracy between a state actor and private parties must be premised on evidence of an agreement and concert of action.

Recommendation at p. 8. This complaint appears to be nothing more than an attempt to relitigate issues already litigated in the state courts. This lawsuit meets the standards of meritless, frivolous, and vexatious litigation under Fed. R. Civ. P. 11 and 42 U.S.C. § 1988.

The court now being sufficiently advised, IT IS ORDERED:

Defendant Jack M. Merritts' Motion to Dismiss (filed April 1, 1997) Is GRANTED.

2. Defendants Colorado National Bank's and David W. Stark's Motion to Dismiss (filed April 22, 1997) Is GRANTED.

3. Defendant C. Jean Stewart's Motion to Dismiss (filed June 17, 1997) Is GRANTED.

4. Defendants Colorado National Bank's and David W. Stark's Motion for Injunction Prohibiting Joseph Vento

from Filing Additional Complaints Against David W. Stark, Colorado National Bank, or Any of Their Agents or Attorneys Without Leave of Court (filed April 22, 1997) Is DENIED.

5. Defendant C. Jean Stewart's Motion to Stay Discovery (filed June 17, 1997) Is DENIED as moot.

6. Defendants Colorado National Bank's and David W. Stark's Motion for Sanctions under Fed. R. Civ. P. 11 (filed April 29, 1997) Is GRANTED. This matter Is hereby referred back to the Magistrate Judge for determination of the amount of reasonable attorney fees and expenses to be awarded.

7. Defendant Jack M. Merritts' request for costs, including reasonable attorney fees pursuant to 42 U.S.C. § 1988 (made April 1, 1997) Is GRANTED. This matter Is hereby referred back to the Magistrate Judge for determination of the amount of reasonable attorney fees and expenses to be awarded.

8. Defendant Stewart's request for costs and attorney fees (made June 17, 1997) Is DENIED.

9. Plaintiff Vento's request for attorney fees for responding to the Motion for Injunction (made May 21, 1997) is DENIED.

10. This civil action is dismissed with prejudice.

DATED at Denver, Colorado, this 4th day of June, 1998.

BY THE COURT:

/s/
United States District Judge

APPENDIX B-2

PROBATE COURT CITY AND COUNTY OF DENVER
STATE OF COLORADO

Case No. 95PR2379

ORDER ON INTERPLEADER PETITION

IN THE MATTER OF
COLORADO NATIONAL BANK,
Plaintiff

v.

JOSEPH A. VENTO, LINDA SAUNDERS, Personal Representative of the Estate of Cecilia DeFellippie, IRENE C. COULTER, RICHARD G. VENTO, ANGELINA VENTO, MARIHELEN VENTO, and WESLEY C. KETTELKAMP, JR.
Defendants

On January 3, 1996, this matter came on for hearing on the Plaintiffs Verified Motion for Leave to Deposit Money With Court and for Injunctive Relief Pursuant to Rule 22 C.R.C.P. The Court has heard arguments and statements from counsel, reviewed the pleadings and motion, and is fully advised in the premises.

The Court finds that the requirements of C.R.C.P. 22 have been met in this case, Colorado National Bank ("CNB") being subject, as to payment of a Judgment obtained against it

in Case No. 87 CV 867 in the District Court in Pueblo County (herein "the Judgment"), to conflicting and inconsistent claims which could, if not resolved, result in multiple liability to CNB. The existence of an outstanding letter of credit from CNB creates an urgent situation.

Based on the foregoing, it is hereby ORDERED:

A. The Plaintiff, CNB, is directed to transfer to account # 1013051262 field at Norwest Bank Colorado, N.A., the sum of approximately $4,400,000 which represents the amount of the Judgment against CNB, plus costs awarded and interest accrued thereon as of this date. The precise calculation of the accrued interest and costs is subject to further review by this Court.

B. The above-referenced account is to be held at interest in the name of "The Denver Probate Court f/b/o Vento Beneficiaries" pursuant to the provisions of C.R.S. § 11-10.5-101 *et. seq.*, until further Order of this Court.

C. Upon transfer of the Judgment amount, and subject only to adjustments of the calculation as described above, CNB shall be considered to have satisfied the Judgment referenced above. This satisfaction of judgment cannot be asserted by CNB to hinder or bar, nor shall it be construed by any court, to hinder or bar any other claims against CNB.

D. Pursuant to C.R.C.P. 22 the Defendants, and each of them, are restrained and enjoined from instituting or prosecuting in any court of this state any action against CNB, wherein the Defendants or any of them, in any manner, seek to recover the amount of the Judgment or any part thereof, to execute on the Judgment, to collect on the Letter of Credit posted for the Judgment, to execute on

any asset of CNB, or to recover any damages for failure of CNB to deliver funds to any of the Defendants to satisfy the Judgment.

DATED January 3, 1996.

/s/_____
C. Jean Stewart
Judge Probate Court

APPENDIX C

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment of the Constitution of the United States provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Section 9(3) of Article VI of the Colorado Constitution provides as follows:

> (3) In the city and county of Denver, exclusive original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians, conservators and administrators, and settlement of their accounts, the adjudication of the mentally ill, and such other jurisdiction as may be provided by law shall be vested in a probate court, created by section 1 of this article, and to which court all of such jurisdiction of the county court of the city and county of Denver shall be transferred, including all pending cases and matters, effective on the second Tuesday of January, 1965.

STATUTES

Title 42 U.S.C. §1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Colorado Revised Statutes 1997 section 5-12-106 provides as follows:

> 5-12-106. Rate of interest on judgments which are appealed. (1) Except as provided in section 13-21-101, C.R.S., where there is no written agreement as to the rate of interest, creditors shall receive interest as follows:
>
> (a) If a judgment for money in a civil case is appealed by a judgment debtor and the judgment is affirmed, interest, as set out in subsections (2) and (3) of this section, shall be payable from the date of entry of judgment in the trial court until satisfaction of the judgment and shall include compounding of interest annually.
>
> (b) If a judgment for money in a civil case is appealed by a judgment debtor and the judgment is modified or reversed with a direction that a judgment for money be entered in the trial court, interest, as set out in subsections (2) and (3) of this section, shall be payable from a date a judgment was first entered in the trial court until the judgment is satisfied and shall include

compounding of interest annually. This interest shall be payable on the amount of the final judgment.

(2)(a) The rate of interest shall be certified on each January 1 by the secretary of state to be two percentage points above the discount rate, which discount rate shall be the rate of interest a commercial bank pays to the federal reserve bank of Kansas City using a government bond or other eligible paper as security, and shall be rounded to the nearest full percent. Such annual rate of interest shall be so established as of December 31, 1982, to become effective January 1, 1983. Thereafter, as of December 31 of each year, the annual rate of interest shall be established in the same manner, to become effective on January 1 of the following year.

(b) Notwithstanding any other provision of this subsection (2), the rate of interest shall be no lower than the percentage authorized in section 5-12-102(4)(b).

(3) The rate at which interest shall accrue during each year shall be the rate which the secretary of state has certified as the annual interest rate under subsection (2) of this section.

Article 9 of Title 13, Colorado Revised Statutes, provides in pertinent part as follows:

Sections 13-9-101 through 13-9-103 of Article 9 of the Colorado Revised Statutes 1997 provide in pertinent part as follows:

13-9-101 Establishment. Pursuant to the provisions of section 1 of article VI of the Colorado Constitution, there is hereby established the probate court of the city and county of Denver.

13-9-102 Court of record – powers. The probate court shall be a court of record with such powers as are inherent in constitutionally created courts and with such legal powers to effectuate its jurisdiction and carry out its orders, judgments, and decrees as are possessed by the district courts.

13-9-103 Jurisdiction. (1): The probate court of the city and county of Denver has original and exclusive jurisdiction in said city and county of:

(a) The administration, settlement, and distribution of decedents, wards, and absentees;

(b) Property vested in any person under a legal disability but paid to or held by another for such person's use or benefit as authorized by a power contained in a will or trust instrument;

(c) Property vested in any minor pursuant to the "Colorado Uniform Transfers to Minors Act", or any predecessor act thereto, or any act having a substantially similar legal effect;

(d) The probate of wills;

(e) The granting of letters testamentary, of administration, of guardianship, and of conservatorship;

(f) The administration of guardian-ships of minors and of mentally competent persons and of conservatorships of mentally ill or mentally deficient persons and of absentees;

(g) Proceedings under article 23 of title 17 and articles 10 to 15 of title 27, C.R.S.;

(h) The determination of heirship in probate proceedings and the devolution of title to property in probate proceedings;

(i) Actions on the official bonds of fiduciaries appointed by it;

(j) The construction of wills;

(k) The administration of testamentary trusts, except as provided in subsection (2) of this section; and

(l) All other probate matters.

(2) If a testamentary trust is established by the will of the decedent and if it appears that it was not the intention of the testator that the court should continue the administration of the estate after the payment in full of all debts and legacies except the trust property, the court shall proceed to final settlement of such estate as in other cases, order the trust fund or property to be turned over to the trustee as such, and shall not require the filing of inventories and accounts, or supervise the administration of the trust; except that any party in interest of such trust, including the trustee thereof, may invoke the jurisdiction of the probate court with respect to any matters pertaining to the administration or distribution of such trust or to construe the will under which it was established.

(3) The court has jurisdiction to determine every legal and equitable question arising in connection with decedents', wards' and absentees' estates, so far as the question concerns any person who is before the court by reason of any asserted right in any of the property of the estate or by reason of any asserted obligation to the estate, including, without limiting the generality of the foregoing, the jurisdiction:

(a) To give full and complete legal and equitable relief in any case in which it is alleged

that the decedent breached an agreement to make or not to make a will;

(b) In any case in which a district court could grant such relief in a separate action brought therein, to impose or raise a trust with respect to any of the property of the decedent or any property in the name of the decedent, individually or in any other capacity, in any case in which the demand for such relief arises in connection with the administration of the estate of a decedent;

(c) To partition any of the real or personal property of any estate in connection with the settlement thereof.

(4) Nothing in this article shall prevent any district court sitting in law or equity from construing a will which is not before the probate court or from determining questions arising in connection with trusts which are not under the jurisdiction of the probate court.

(5) The court has jurisdiction to determine every legal and equitable question arising out of or in connection with express trusts.

(6) The provisions of articles 10 to 20 of title 15, article 23 of title 17, and articles 10 to 15 of title 27, C.R.S., shall govern the issuance and service and proof of service of any process, notice, citation, writ, or order of court and shall govern all other proceedings had pursuant to the powers of the court recited in subsections (1) and (2) of this section. The Colorado rules of civil procedure shall govern such matters when the proceedings are had pursuant to the powers granted to the court under any of the other provisions of this section.

(7) With respect to any trust established by or for an individual with his or her assets, income, or property of any kind, notwithstanding any statutory provision to the contrary, the court shall not authorize, direct, or ratify any trust that either has the effect of qualifying or purports to qualify the trust beneficiary for federal supplemental security income, or public or medical assistance pursuant to title 26, C.R.S., unless the trust meets the criteria set forth in sections 15-14-409.6 to 15-14-409.9, C.R.S., and any rule adopted by the medical services board pursuant to section 26-4-506.6, C.R.S.

RULES

Rule 8(e)(2) of the Federal Rules of Civil Procedure provides as follows:

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

Rule 22, Interpleader, of the Colorado Rules of Civil Procedure provides as follows:

(1) Persons having claims against the plaintiff may be joined as defendants and required

to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross claim or counterclaim. The provisions of this Rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(2) In any civil action of interpleader, a district court may enter its order restraining all claimants from instituting or prosecuting any proceeding in any court of this state affecting the property, instrument, or obligation involved in the interpleader action until further order of the court. Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.

APPENDIX D-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 97-S-463

JOSEPH A. VENTO,

Plaintiff,

v.

COLORADO NATIONAL BANK, C. JEAN STEWART, DAVID W. STARK and JACK M. MERRITTS,

Defendants.

COMPLAINT

COUNT I

1. This is an action to redress the deprivation by the defendants of the rights of the plaintiff Joseph A. Vento secured by the Constitution and the laws of the United States and the State of Colorado.

2. Jurisdiction of the Court is invoked under the provisions of sections 1983 and 1988 of Title 42 of the United States Code.

3. During all times mentioned in this Complaint, the plaintiff was, and he still is, an adult citizen of the United States residing in Pueblo, Colorado, and is an attorney registered with the Supreme Court of Colorado under number 637.

4. During all times mentioned in this Complaint, the defendant C. Jean Stewart was, and still is, the duly appointed Probate Judge in the City and County of Denver, Colorado, and was acting in her official capacity. She is sued, however, only in her individual capacity.

5. During all times mentioned in this Complaint, the defendant Colorado National Bank (CNB) was, and still is, a national banking association having its principal place of business in the State of Colorado.

6. During all times mentioned in this Complaint, the defendant David W. Stark was, and still is, a citizen of the United States residing in Denver, Colorado.

7. During all times mentioned in this Complaint, the defendant Jack M. Merritts was, and still is, a citizen of the United States residing in Denver, Colorado.

8. During all times mentioned in this Complaint, the Defendants were acting under color of law, that is, under color of the Constitution, statutes, laws, charter, ordinances, rules, regulations, customs and usages of the State of Colorado and the City and County of Denver, Colorado.

9. Colorado National Bank (CNB) as plaintiff filed a Complaint For Interpleader and Injunctive Relief in the Probate Court In and For the City and County of Denver, Colorado, on December 29, 1995, Case No. 95 PR 2379. The matter was set for hearing on January 3, 1996, at 10:30 a.m. On that same day, that is, January 3, 1996, after a hearing that lasted a little over an hour, the defendant, the Honorable C. Jean Stewart of the Denver Probate Court entered an Order on Interpleader Petition, Exhibit A attached, which included a temporary or preliminary injunction

enjoining the plaintiff Joseph A. Vento from doing the things set forth in Paragraph D of the Order on Interpleader Petition, as follows:

> D. Pursuant to C.R.C.P. 22 the Defendants, and each of them, are restrained and enjoined from instituting or prosecuting in any court of this state any action against CNB, wherein the Defendants or any of them, in any manner, seek to recover the amount of the Judgment or any part thereof, to execute on the Judgment, to collect on the Letter of Credit posted for the Judgment, to execute on any asset of CNB, or to recover any damages for failure of CNB to deliver funds to any of the Defendants to satisfy the Judgment.

10. The Complaint for Interpleader and Injunctive Relief in Case No. 95 PR 2379 and the notice of the hearing with respect to a Verified Motion For Leave To Deposit Money With Court and For Injunctive Relief to be held in the Denver Probate Court on January 3, 1996, at 10:30 a.m. was given by serving the plaintiff Joseph A. Vento with process and notice of the hearing on January 3, 1996, at his home in Pueblo, Colorado, at 7:45 a.m., which is more than 100 miles from Denver, Colorado.

11. Along with the Complaint in Case No. 95 PR 2379, there was also served on the plaintiff Joseph A. Vento, on that same morning of January 3, 1996, at 7:45 a.m., a Summons. Among other provisions in the Summons were the following words:

> You are hereby summoned and required to file with the Clerk of the Court an answer or other response to the attached Complaint for Interpleader and Injunctive Relief. If service of the summons and complaint was made upon you within the State of Colorado, you are required to file your answer or other response within 20 days after such service upon you...

Only a few hours were given for the plaintiff Joseph A. Vento to appear in the Denver Probate Court at 10:30 a.m. on January 3, 1996, and 20 days were not given to him to file an answer or other response to the Complaint. Interpleader was wrongfully ordered before the plaintiff Joseph A. Vento could file an answer setting forth any defenses he may have had to the interpleader action or otherwise contest the interpleader complaint. See Transcript of Hearing of January 3, 1996, in Case No. 95 PR 2379, attached as Exhibit B ("Transcript").

12. At about 9:15 a.m. on January 3, 1996, the plaintiff Joseph G. Vento called the law firm of Dufford & Brown, P.C., in Denver, Colorado, and asked them to appear specially at the 10:30 a.m. hearing on that same date, January 3, 1996, on his behalf. Upon appearing for the plaintiff Joseph A. Vento at that hearing on January 3, 1996, the law firm of Dufford & Brown, P.C., through Phillip D. Barber, Esq., requested a continuance but the request was denied. (See lines 21-24 on page 8 of Exhibit B.) Also, at that hearing Phillip D. Barber filed a motion for a change of venue to Pueblo, Colorado, which either then or later was denied. After a brief hearing with only some discussion and argument but no testimony, the Denver Probate Court forthwith entered its Order on Interpleader Petition (Exhibit A). The law firm of Dufford & Brown, P.C. no longer represents the plaintiff Joseph A. Vento in Case No. 95 PR 2379 having withdrawn from that representation on or about May 15, 1996, because of an alleged conflict of interest. Two lawyers, Phillip D. Barber of Dufford and Brown, P.C., who at the time represented the plaintiff, Joseph A. Vento, and John A Purvis of Purvis, Gray, Schvetze & Gordon, who was the attorney for a defendant in Action No. 95 PR 2379, W.C. Kettelkamp, Jr., thereafter filed affidavits with respect to that hearing, which affidavits are attached hereto as Exhibits C and D.

13. In that Order on Interpleader Petition (Exhibit A), the Denver Probate Court purported to satisfy the Judgment obtained against CNB in Case No. 87 CV 867 in the District

Court in Pueblo County without any payments being made to the judgment creditors, and before the Mandate issued out of the Colorado Court of Appeals on January 5, 1996, affirming the judgment granted in Case No. 87 CV 867 in Pueblo County District Court.

14. On the afternoon of January 3, 1996, the plaintiff Joseph A. Vento faxed to his counsel a copy of the Denver Probate Court's December 15, 1995, Disclosure Notice and Order (see attached Exhibit E) that was issued in case No. 95 PR 2301 in the Probate Court, City and County of Denver, Colorado. In that Disclosure Notice the defendant, C. Jean Stewart, stated that she had represented Colorado National Bank (CNB) as a fiduciary in an unrelated matter. The plaintiff Joseph A. Vento, through his counsel, Moved to Disqualify Or, Alternately, For Recusal. On January 16, 1996, The Honorable C. Jean Stewart signed a Recusal Order without vacating her previous Order on Interpleader Petition, thus leaving that Order to stand.

15. On December 21, 1995, the defendant Jack M. Merritts wrote a letter to CNB demanding that CNB immediately take all appropriate action including, but not limited to, to seek an order of appropriate court to deposit the funds that would otherwise be paid the plaintiff Joseph A. Vento in an interest bearing account with a national bank in Denver not affiliated with the Colorado National Bank. See Exhibit F attached.

16. On January 2, 1996, the defendant Jack M. Merritts faxed and then mailed to the attorneys for CNB and others A Response To Plaintiff's Verified Motion For Leave To Deposit Money With Court And For Injunctive Relief By Defendants Irene C. Coulter, Richard G. Vento, Angelina Vento and Marihelen Vento in which he sought some changes in the Bank's Verified Motion For Leave To Deposit Money With the Court and For Injunctive Relief Pursuant To Rule 22 C.R.C.P., and after making such changes requested the Court to enter an order accepting the deposit of funds described in

the Bank's Motion into the Registry of the Court. See attached Exhibit G.

17. On January 3, 1996, Jack M. Merritts stated to the Denver Probate Court that, "Your Honor, as we have said before, we do support the bank's motion that there should be a deposit of funds, and we do believe it should be in this Court." He also participated in the proceedings on January 3, 1996, in the manner of seeking an immediate decree or order of interpleader. See lines 20-23 on page 28 of Exhibit B. He also stated as shown on lines 6 through 13 on page 6 of Exhibit B that he filed documents in the Court on January 2, 1996.

18. On January 2, 1996, the then counsel for the plaintiff Joseph A. Vento, Dufford & Brown, P.C., faxed a letter to defendant Jack M. Merritts warning him and his clients not to interfere with the Bank's payment of the judgment in the 1987 Action. See attached Exhibit H.

19. The defendant David W. Stark, on December 29, 1996, signed the Complaint For Interpleader and Injunctive Relief and also the Verified Motion for Leave To Deposit Money With the Court and for Injunctive Relief on behalf of CNB pursuant to Rule 22 C.R.C.P. in Case No. 95 PR 2379. He also prepared a proposed order which he tendered or gave to attorneys representing other parties on January 2, 1996, and then tendered the said proposed order to the Denver Probate Court on January 3, 1996. He presented the case on behalf of CNB to the Denver Probate Court and sought and got an immediate decree or order in interpleader.

20. The defendant David W. Stark made the following statements at the hearing on January 3, 1996, in the Denver Probate Court:

> And of course we are concerned that if the mandate issues from the Colorado Court of Appeals, that then someone could try to call that letter of credit. We would have competing claims by Mr. Merritt's clients and by Mr. Powers, by

Mr. Littlepage. And that's why we need the order that we are seeking here. And that order would be to enjoin and restrain all those parties from attempting to collect on that judgment or enforce the letter of credit or call the letter of credit. And that's why we are here today. That's why we -- we view this as an emergency matter that must be decided quickly, because any day now I expect that mandate may issue. And if the mandate issues I fully expect Mr. Barber and Mr. Purvis and their clients to exercise whatever rights they may have with regard to that letter of credit and try to call it. And then I think all the parties in this case are in a much bigger mess than they are right now. (lines 3-22 on page 35 of Exhibit B)

The concern that I had quite frankly in drafting this (the proposed order) is that we need the satisfaction of judgment, and we need to make sure that the interest doesn't continue to accrue once the money is paid. (lines 10-13 on page 47 of Exhibit B)

21. The actions of the defendants through the Denver Probate Court on and before January 3, 1996, and thereafter violated the rights of the plaintiff Joseph A. Vento under the Fourteenth Amendment to the United States Constitution and Title 42 U.S.C. §1983 in that:

(a) Joseph A. Vento was not given a hearing that gave him the right to interpose reasonable and legitimate defenses to the Order on Interpleader Petition on January 3, 1996.

(b) Joseph A. Vento was not treated fairly and there was not fundamental fairness with respect to the hearing on January 3, 1996, and thereafter.

(c) Joseph A. Vento was not given his day in court.

(d) Joseph A. Vento was unfairly denied his motion for continuance on January 3, 1996. A fair tribunal is a basic and core requirement of the process.

(e) Joseph A. Vento was not apprised of the action against him by notice that comports with the requirements of due process and afforded the opportunity to be heard at a meaningful time and in a meaningful manner.

22. All judicial action, orders and acts of the defendant Probate Judge C. Jean Stewart on January 3, 1996, and any acting Probate Judge thereafter in the Denver Probate Court in Case No. 95 PR 2379 were void because of the complete absence of subject matter jurisdiction and lack of person jurisdiction of some of the defendants as follows:

(a) The jurisdiction of the Denver Probate Court stems from Article VI, Section 9(3) of the Colorado Constitution and Colorado Revised Statutes (C.R.S.) §13-9-103(3). These provisions vest the Denver Probate Court with subject matter jurisdiction to determine legal and equitable questions in connection with estates, probate matters, wills and trusts only. The Denver Probate Court is a court of limited jurisdiction and does not have subject matter jurisdiction over the interpleader action filed by CNB under Colorado Rules of Civil Procedure (C.R.C.P.) 22 in Case No. 95 PR 2379.

(b) The Denver Probate Court lacked subject matter jurisdiction to issue the preliminary injunction on January 3, 1996, set forth as Paragraph D in the Order on Interpleader Petition (Exhibit A) by not ordering CNB to give security as required by C.R.C.P. 65(c) and CNB not giving proper notice as required by C.R.C.P. 65(A)(1).

(c) The Denver Probate Court does not have power to exercise jurisdiction over an interpleader action under C.R.C.P. 22. C.R.C.P. 22(2) provides as follows:

> (2) In any civil action of interpleader, a district court may enter its order restraining all claimants from instituting or prosecuting any proceeding in any court of this state affecting the property, instrument, or obligation involved in the interpleader action until further order of the court. (emphasis added)
>
> Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment. (emphasis added)

Only a district court may enter its order ... and ... Such district court shall hear and determine the case (emphasis added).

(d) The interpleader proceedings were not conducted in accordance with the Colorado Rules of Civil Procedure and were manifestly improper and in violation of due process of law. A decree cannot be entered in an interpleader action until all of the defendants have had an opportunity to answer or contest the interpleader complaint. Neither plaintiff Joseph A. Vento nor the other defendants were given time to file an answer to the Complaint and through his attorney the plaintiff Joseph A. Vento was abruptly denied a continuance (lines 2 through 25 on page 8 and line 1 of page 9 of Exhibit B). The Denver Probate Court issued an Order in Case No. 95 PR 2379 within a matter of hours after service of process was made (and without service of process in some cases).

(e) Lack of personal service over some of the defendants is set forth in Exhibit B as follows:

(1) "With regard to Mr. Kettelkamp (the defendant Wesley C. Kettelkamp) Mr. Kettelkamp has not been served (lines 23-24 on page 9) .... "Obviously he will need to be served in this action or be required to accept service (lines 4-5 on page 10).

(2) THE COURT: ... And I realize I don't have jurisdiction over Mr. Littlepage, but I am relying on a representation to be made to me this morning that he will bring that action here and consolidate it with this case. (lines 10-14 on page 38 of Exhibit B)

23. The defendants, David W. Stark and Jack M. Merritts and CNB through its attorneys and agents, jointly engaged with the defendant, C. Jean Stewart the Probate Judge, in the following acts prohibited under 42 USC §1983, by instigating and initiating an interpleader proceedings in the Probate Court of the City and County of Denver, Colorado, resulting in the defendant C. Jean Stewart issuing an Order on Interpleader Petition on January 3, 1996, which Order satisfied a judgment granted to Joseph A. Vento by the District Court of Pueblo County, Colorado, without paying him any money, causing him to be deprived of his property and interest in property, that is, his right to execute and collect on the judgement granted to him by the Pueblo County District Court, and his right to one-half of the judgment of Cecelia DeFellippie, all without appropriate process. All this property and rights to property are secured to the plaintiff Joseph A. Vento by the provisions of Colorado law with respect to judgments and the enforcement thereof, and are protectable property interests created by the law of the State of Colorado.

24. The defendant C. Jean Stewart as the Probate Judge collaborated with, participated with and acted together with the remaining defendants in having the Denver Probate Court issue an Order on Interpleader Petition (Exhibit A) on January 3, 1996, and producing a constitutional wrong to the plaintiff Joseph A. Vento by depriving him of his property and right to property without appropriate process. The Fourteenth Amendment to the Constitution of the United States prohibits state actions such as done here by the Denver Probate Court which deprive "any person of ... property without due process of law."

25. Some inferences, circumstances and facts indicating that the Court had already agreed to with respect to acting together with the remaining defendants and conspiring with them are as follows:

(a) THE COURT: Okay. Well, your motion (for continuance) will be denied. (lines 25 on page 8 and 1 on page 9 of Exhibit B)

(b) THE COURT: Mr. Stark, I don't think there is any question that the bank is entitled to the relief you have asked for. (lines 18-21 on page 15 of Exhibit B)

(c) THE COURT: I can't imagine any attorney in this room would argue that the bank isn't in a tough spot here and needs some guidance in who gets the funds and how to distribute it. (lines 24-25 on page 15 and 1-2 on page 16 of Exhibit B)

(d) THE COURT: ... I understand that you feel that the interpleader is not an appropriate remedy, and I don't agree with you on that. (line 25 on page 37 and 1-2 on page 38 of Exhibit B) ... I am going to grant the bank's motion for the deposit of the funds here in this court. (lines 9-10 on page 38 of Exhibit B)

(e) THE COURT: Okay. All right. Well, I made a preliminary contact a few moments before I came on the bench with Norwest Bank Colorado inquiring whether or not -- I know this has been painful for one bank to hear. But in keeping with the request of some of the parties, I realized that Colorado National Bank was not an option. So I made an inquiry, and they are willing to take this deposit this afternoon. Are you in a position to make this? (lines 3 to 11 on page 53 of Exhibit B)

(f) THE COURT: Okay. All right. What will happen then, I will issue this order this afternoon. (lines 20-21 on page 53 of Exhibit B)

(g) THE COURT: ... Okay. The account number will be 101 ____. I didn't ask for this account in

advance of the argument. I want you to know that I really had absolutely no idea how this was going to come out. But the bank was anxious to accommodate me when I made the inquiry, so they provided this number in case you needed it, 1013051262. And the contact persons are Ann Thacker, T-H-A-C-K-E-R, who is a vice president at the bank, whose direct line is 863-4542. She has an assistant whose name is Barbara McCoin, M-c-C-O-I-N, and her number is 863-5052. And it's called Norwest Bank Colorado, National Association, or abbreviation N.A. Okay. And in the order, I will include instructions that the Norwest Bank fund is not to be disbursed without -- in whole or in part -- without further order of this Court. (lines 12 to 25 on page 54 and line 1 on page 55 of Exhibit B)

26. As a result of the acts and conduct of the defendants acting through the Denver Probate Court, Joseph A. Vento was deprived of his property which included the right to execute and collect on the judgment granted to him by the District Court of Pueblo County, Colorado, on June 15, 1993, which judgment was affirmed by the Colorado Court of Appeals and certiorari with respect to reviewing same denied by the Colorado Supreme Court.

COUNT II

The plaintiff Joseph A. Vento realleges and incorporates herein by reference paragraphs 1 through 26 above..

27. The official acts of the defendant Probate Judge C. Jean Stewart, in issuing the Interpleader Order on Petition on January 3, 1996, was a product of a conspiracy with the defendants David W. Stark, CNB acting through its agents and attorneys, and Jack M. Merritts conspiring with and acting in concert with the defendant Probate Judge C. Jean Stewart which constituted a wrong to the plaintiff Joseph A. Vento by depriving him of his property and rights to property without appropriate process, that is, the right to execute and

collect on the judgment granted him by the District Court of Pueblo County on June 15, 1993.

28. There was an agreement either express or implied between the defendant Probate Judge C. Jean Stewart and the remaining defendants by which they acted in concert to violate plaintiff Joseph A. Vento's rights resulting in the deprivation of his property without due process of law.

29. Among the other wrongful goals of the conspiracy, there was the matter of (1) interpleading through the Denver Probate Court, a court of limited jurisdiction, a judgment of the Pueblo County District Court, (2) having the Denver Probate Court satisfy a judgment of the Pueblo County District Court, and (3) purporting to satisfy a judgment without paying the judgment creditors.

30. The defendants by their acts pieced together a basis for an interpleader suit, each of the defendants performed their respective parts toward attainment of the interpleader action and completed the interpleader procedure without due process with the view of depriving by the defendants of Joseph A. Vento of his property, i.e., the right to execute and collect on his judgment.

COUNT III

The plaintiff Joseph A. Vento realleges and incorporates herein by reference paragraph 1 through 30 above.

31. The defendants engaged in one or more of the following in violation of the plaintiff Joseph A. Vento's rights as set forth herein: (1) willful or malicious violation of his constitutional rights, or (2) intentional acts by the defendants in gross regard of the rights of the plaintiff, or (3) reckless disregard by the defendants that they were violating the rights of the plaintiff.

32. As a direct and proximate result of the acts and omissions of the defendants herein described, the plaintiff

Joseph A. Vento incurred, suffered and should be made whole for the following damage and loss:

(1) The amount of his judgment granted him by the Pueblo County District Court on June 15, 1993, as amended for prejudgment interest plus 8% compound interest per annum from June 15, 1993, to date and continuing. On January 3, 1996, this amounted to approximately $2,200,000. (See Exhibit A).

(2) Interest including prejudgment interest.

(3) One-half of the judgment of Cecelia DeFellippie. This amounted to approximately $1,100,000 on January 3, 1996.

(4) The money spent to retain the services of an attorney, and

(5) Attorney fees for representing himself.

WHEREFORE, the plaintiff Joseph A. Vento claims judgment against the defendants and each of them, jointly and severally as follows:

A. Compensatory damages in an amount this Court shall consider to be just, reasonable and fair;

B. Punitive damages in an amount this Court shall consider to be just, reasonable and fair;

C. Attorney's fees and the costs of this action;

D. Interest, including prejudgment interest; and

E. Such other relief as this Court shall consider to be fair and equitable.

JURY DEMAND

Plaintiff demands a trial by jury in this action.

THE PLAINTIFF

By:
/s/
Joseph A. Vento, #637
Pro se
102 South Tejon, Suite 1100
Colorado Springs, CO 80903
(719) 578-3329

Address of Plaintiff Joseph A. Vento

3109 Country Club Drive
Pueblo, Colorado 81008

APPENDIX D-2

PROBATE COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Case No. 95PR2379

COMPLAINT FOR INTERPLEADER AND INJUNCTIVE RELIEF

COLORADO NATIONAL BANK,
Plaintiff,

v.

JOSEPH A. VENTO, LINDA SAUNDERS, Personal Representative of the Estate of Cecilia DeFellippie, IRENE C. COULTER, RICHARD G. VENTO, ANGELINA VENTO, MARIHELEN VENTO, and WESLEY C. KETTELKAMP, JR.,
Defendants.

The Plaintiff, Colorado National Bank ("CNB"), by and through its attorneys, Otten, Johnson, Robinson, Neff & Ragonetti, P.C., pursuant to Rule 22 C.R.C.P., for its claim in interpleader and for injunctive relief states as follows:

1. CNB is a party to an action entitled Joseph A. Vento and Cecilia DeFellippie v. Colorado National Bank-Pueblo, Case No. 87 CV 867, pending in Pueblo District Court (the "1987 Action"). The Plaintiffs in the 1987 Action

each obtained a judgment against CNB in the amount of $931,962.50 on or about June 23, 1993 (the "Judgments"). The trail court also awarded costs and interest at 8% from March 22, 1985.

2. CNB is also a party to an action entitled In the Matter of the Joseph A. Vento Trust and Related Vento Family Trusts, Case No. 95 PR 2301, pending in the Probate Court in and for the City and County of Denver, State of Colorado (the "Resignation Action"). In the Resignation Action, CNB has filed a Petition asking the Court to confirm its resignation as trustee of the Joseph A. Vento Trust, Cecelia DeFellippie Trust, Irene C. Coulter Trust, Dominic A. Vento Trust and various trusts for the benefit of the children of Joseph A. Vento.

3. Defendant Joseph A. Vento is a beneficiary of the Joseph A. Vento trust and was a plaintiff in the 1987 Action.

4. Defendant Linda Saunders ("Saunders") is the personal representative of the estate of Cecilia DeFellippie. Cecilia DeFellippie was a plaintiff in the 1987 Action and the beneficiary of the Cecilia DeFellippie trust. Cecilia DeFellippie died on or about December 1, 1995.

5. Defendant Irene C. Coulter is the beneficiary of the Irene C. Coulter trust.

6. Defendants Richard G. Vento, Angelina Vento and Marihelen Vento are beneficiaries of the Dominic A. Vento trust.

7. Defendants Irene C. Coulter, Richard G. Vento, Angelina Vento and Marihelen Vento were not parties to the 1987 Action, However, they filed suit in June of 1994 in Denver District Court against the Colorado National Bank alleging claims relating to the 1987 Action.

8. Defendant Wesley C. Kettelkamp, Jr. is an attorney licensed to practice law in Colorado. Mr. Kettelkamp was attorney for Joseph A. Vento and Cecilia DeFellippie In

the 1987 Action. Upon information and belief, Mr. Kettelkamp has a claim to some portion of the Judgments.

9. CNB appealed the Judgments and posted a supersedeas bond in the form of a letter of credit dated October 4, 1993, in favor of the District Court, Pueblo County, Colorado in the amount of $4,000,000.00 (the "Letter of Credit").

10. The appeals of CNB proved unsuccessful and the Colorado Supreme Court denied CNB's Petition for a Writ of Certiorari on or about December 11, 1995.

11. The amount of the Judgments resulting from the 1987 Action, including pre- and post-judgment interest, is now approximately $4,347,307.48.

12. A dispute has arisen among all Defendants concerning the division of the proceeds of the Judgments payable to the Plaintiffs in the 1987 Action.

13. On or about December 22, 1995, Saunders filed an action entitled Linda Saunders, as Personal Representative for the Estate of Cecilia DeFellippie v. Joseph A. Vento and Wesley C. Kettelkamp, Jr., in the District Court, Pueblo County, Colorado in which Saunders alleges that a dispute exists regarding a division of the proceeds of the Judgments payable to the plaintiffs in the 1987 Action. A copy of Saunders' Verified Motion for Preliminary Injunction is attached hereto as Exhibit A and incorporated by reference as if fully set forth herein.

14. Defendants Irene C. Coulter, Richard G. Vento, Angelina Vento and Marihelen Vento have advised CNB that they also claim an interest in the proceeds of the Judgments. A copy of a letter dated December 21, 1995 from Jack M. Merritts, attorney for Defendants Irene C. Coulter, Richard G. Vento, Angelina Vento and Marihelen Vento, demanding that CNB take all appropriate action to secure a court-supervised escrow for the proceeds of the Judgment in favor of Joseph

A. Vento is attached hereto as Exhibit B and incorporated by reference as if fully set forth herein.

15. As described in Exhibits A and B, CNB may be exposed to claims by some or all of the Defendants if the Defendants are not required to interplead in this action and if CNB is not allowed to deposit the proceeds of the Judgments with this Court in an interest-bearing account.

16. CNB neither has, nor claims, any interest in the Judgments and is willing to pay the amount of the Judgments to such person or persons as should be lawfully entitled to receive it and to whom CNB could safely and without hazard to itself pay the same. CNB offers to bring the total amount necessary to satisfy the Judgments into the Court at such time and under such conditions as the Court may order and direct.

17. CNB is not in collusion with any Defendant or any other party making claim to the funds and has not brought this Complaint in Interpleader at the request of any party, but has filed it upon the advice of its counsel and of its own free will, in order to avoid being harassed and being subjected to double costs and double liability and to avoid unnecessary lawsuits.

18. Rule 22(2) C.R.C.P. provides that "[i]n any civil action of interpleader, a district court may enter its order restraining all claimants from instituting or prosecuting any proceeding in any court of this state affecting the property, instrument or obligation involved in the interpleader action until further order of court." It is necessary that this Court enter an order restraining and enjoining the Defendants and each of them from commencing in any court any action against CNB, where the Defendants or any of them, in any manner, seek to recover the amount of the Judgments, or any part of that sum, to execute on the Judgments, to collect on the Letter of Credit posted for the Judgments, to execute on any asset of CNB, or to recover any damages for failure of CNB to deliver funds to any of the Defendants to satisfy the Judgments.

19. This action for interpleader is CNB's only means of protecting itself from litigation in which it has no interest.

WHEREFORE, the Plaintiff prays for relief as follows:

A. This Court enter an order requiring the Defendants to interplead in this cause and to settle their respective rights to the Judgments;

B. This Court enter an order authorizing and directing the Plaintiff, the Colorado National Bank, to pay into the registry of the Court the amount of the Judgments in the 1987 Action, plus costs awarded and interest, as full satisfaction for the Judgments in the 1987 Action;

C. This Court enter an order authorizing and directing the Clerk of this Court to invest the proceeds of the Judgments in an interest-bearing account;

D. This Court enter an order restraining and enjoining the Defendants and each of them from commencing in any court of this state any action against CNB, where the Defendants or any of them, in any manner, seek to recover the amount of the Judgments, or any part of that sum, to execute on the Judgments, to collect on the Letter of Credit posted for the Judgments, to execute on any asset of CNB, or to recover any damages for failure of CNB to deliver funds to any of the Defendants to satisfy the Judgments;

E. This Court enter in order awarding judgment in favor of the Plaintiff, CNB, and forever releasing and discharging CNB from any and all liability to the Defendants with respect to all matters relating to the Judgments in the 1987 Action;

F. This Court enter a satisfaction of judgment in favor of CNB on the Judgments and the 1987 Action;

G. This Court award CNB its costs and attorneys' fees incurred in this action; and

H. The Court grant such other, further and different relief as it deems just and proper.

DATED December 29, 1995.

Respectfully submitted,

OTTEN, JOHNSON, ROBINSON,
NEFF & RAGONETTI, P.C.

By /s/_____
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Supreme Court, U.S.
FILED
SEP 13 1999
OFFICE OF THE CLERK

No. 99-255

In The

Supreme Court of the United States

JOSEPH A VENTO,

Petitioner,

v.

U.S. BANK, f/k/a COLORADO NATIONAL BANK; C. JEAN STEWART; DAVID W. STARK; AND JACK M. MERRITTS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

U.S. Bank, formerly known as Colorado National Bank ("CNB"),[1] and David W. Stark, Respondents, respectfully request that the Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit filed by the petitioner Joseph A. Vento.

COUNTER-STATEMENT OF THE CASE

Mr. Vento asks this Court to review a decision of the United States Court of Appeals for the Tenth Circuit affirming the dismissal of a suit brought in federal court by Mr. Vento. Petitioner had sued a party, attorneys, and the presiding judge in an interpleader action in the Probate Court for the City and County of Denver, Colorado ("Denver Probate Court"), alleging that they had conspired to deprive him of his property and the right to litigate without due process of law. Although Petitioner has attempted to cast this as a civil rights action, he in fact has sought both to appeal the decision of the Denver Probate Court in the U.S. District Court for the District of Colorado in violation of the *Rooker-Feldman* doctrine, and to obtain double recovery of a judgment he has already collected from CNB.

Petitioner's "Statement of Facts" omits details of his many attempts to overturn the order of the Denver

[1] CNB has now been acquired by U.S. Bancorp and is currently known as U.S. Bank. For purposes of this appeal, all references to the bank will remain "CNB."

Probate Court dated January 3, 1996 ("Interpleader Order," *Petition for Writ of Certiorari ["Petition"], App. B-2, pp. 30-32*), and to obtain double recovery of the judgment awarded to him by the District Court for Pueblo County, Colorado ("Pueblo District Court"). Petitioner has steadfastly refused to accept the ruling of the Denver Probate Court that CNB's payment of the amount of Mr. Vento's judgment into the registry of the Denver Probate Court during a dispute over the proceeds of the judgment relieved CNB of further responsibility for the judgment. Indeed, Mr. Vento has attempted unsuccessfully to overturn the Interpleader Order in six separate requests to the Denver Probate Court,[2] and an appeal to each of the

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[2] The following pleadings are listed in the Excerpts from the Certified Record of Denver Probate Court, *Appendix A at pp. 1-4*:

(1) Motion to Change Venue, filed January 8, 1996, denied April 26, 1996;

(2) Motion to Vacate, filed January 8, 1996, denied April 26, 1996);

(3) Renewed Motion to Change Venue, filed January 24, 1996, denied April 26, 1996;

(4) Motion for Relief from January 3 Order on Interpleader, filed February 8, 1996, denied April 26, 1996;

(5) Objection by Defendant Joseph A. Vento to CNB Being Discharged From All Further Liability and Dismissed From This Case; Affirmatively for a Motion for an Order to Dismiss this Case, or Alternatively for an Order Vacating or Dissolving the Preliminary or Temporary Injunction, filed October 18, 1996, denied December 13, 1996; and

Colorado Court of Appeals and Colorado Supreme Court.[3] He has unsuccessfully sought to hold CNB in contempt for allegedly failing to pay the amount of the judgment[4], and has commenced two separate actions attempting to recover damages equal the amount of the judgment[5], all after CNB paid the amount of the judgment into the registry of the Denver Probate Court.

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(6) Amended Answer of Joseph A. Vento (alleging lack of due process as an affirmative defense), filed September 25, 1996.

[3] Mr. Vento applied to the Colorado Supreme Court for Writs of Prohibition and Mandamus against the Denver Probate Court on June 20, 1996, with the petition being denied one week later (*Appendix B at pp. 5-6*). On July 26, 1996, Mr. Vento appealed the April 26, 1996 Denver Probate Court Order to the Colorado Court of Appeals, which dismissed the appeal *with prejudice* on August 9, 1996 (*Appendix C at p. 8*).

[4] On April 26, 1996, in case no. 87 CV 867, Pueblo District Court Judge O'Rourke denied Mr. Vento's request that she hold CNB in contempt for CNB's alleged failure to pay the judgments in that action, and ruled that the jurisdiction of the Denver Probate Court was a question that only the Denver Probate Court could decide (*Appendix D at pp. 10-13*). Mr. Vento appealed this decision to the Colorado Court of Appeals which affirmed the decision. *Vento v. Colorado National Bank*, 1999 WL 46924 (Colo. App. 1999).

[5] In addition to the present action, Mr. Vento brought case no. 97 CV 31 against CNB in the Pueblo District Court, claiming that CNB had breached the Letter of Credit it posted as a supersedeas bond by filing the action in the Denver Probate Court. The Pueblo District Court granted summary judgment in favor of CNB in that case on April 1, 1997 (*Appendix E at pp. 14-20*). Mr. Vento appealed that decision to the Colorado Court

Statement of Facts and Procedural History

In 1968, the Joseph A. Vento Trust, the Dominic A. Vento Trust, the Irene C. Coulter Trust and the Cecilia DeFellippie Trust became co-owners of an undivided one-quarter interest in coal mining property in Fremont County, Colorado. CNB and its predecessors (the First National Bank of Pueblo, which became Colorado National Bank-Pueblo, which became CNB) acted as the sole Trustee of each of the four trusts which owned the coal mining property. (Affidavit of David Stark at ¶ 2, *Appendix N at p. 38*).[6]

On or about September 8, 1987, Mr. Vento and Cecilia DeFellippie ("Ms. DeFellippie") filed suit in Pueblo District Court against CNB's predecessor asserting breach of fiduciary duty in managing and administering their trusts and the Trust property, styled *Joseph A. Vento and Cecilia DeFellippie v. Colorado Nat'l Bank-Pueblo*, Case No. 87CV867 ("the 1987 Action"). CNB was represented by Respondent Mr. Stark. On June 15, 1993, the plaintiffs in the 1987 Action each won a judgment against CNB in the amount of $931,962.50, plus costs and interest at 8% per annum from March 22, 1985 ("the Judgments"). The total judgments, including pre- and post-judgment interest was approximately $4,347,307.48. (Affidavit of David Stark at ¶ 3, *Appendix N at p. 39*).

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of Appeals, which affirmed Judge Vigna's judgment on April 23, 1998 (*Appendix F at pp. 21-24*). A petition for certiorari to the Colorado Supreme Court was denied on December 7, 1998. (*Appendix G at pp. 25-26*).

[6] Mr. Stark's affidavit was part of the record in the appeal below.

CNB unsuccessfully appealed the Judgments to the Colorado Court of Appeals, posting a supersedeas bond in the form of a letter of credit in the amount of $4 million ("the Letter of Credit"). The Colorado Supreme Court denied CNB's petition for certiorari on December 11, 1995. (Affidavit of David Stark at ¶ 3, *Appendix N at p. 39*)

Meanwhile, in June 1994, the beneficiaries of the Irene C. Coulter Trust and the Dominic A. Vento Trust sued CNB and Mr. Vento in the District Court for the City and County of Denver, Colorado, in a case styled *Richard G. Vento, Angelina Vento, Marihelen Vento, and Irene C. Coulter v. Colorado National Bank-Pueblo, Joseph A. Vento, and John Does A-Z*, Case No. 94 CV 2890 (the "1994 Action"), alleging, among other claims, breach of fiduciary duty and negligence, because they were not included in or advised of the 1987 Action. The beneficiaries also filed an action against Mr. Stark, his law firm, and other attorneys who defended CNB in the 1987 Action, based on the same allegations. CNB settled with the plaintiffs in the 1994 Action, and Mr. Vento thereafter prevailed on the claims against him following a jury trial in April 1996. (Affidavit of David Stark at ¶ 4, *Appendix N at p. 39*)

While CNB's appeal of the 1987 Action was pending, serious disputes arose among members of the Vento family concerning the division of the proceeds of the Judgments payable to Mr. Vento and Ms. DeFellippie. Following the denial of CNB's petition for certiorari on December 11, 1995, CNB received conflicting demands from the beneficiaries of the Irene C. Coulter and Dominic A. Vento Trusts, as well as from attorneys for Ms. Saunders and Mr. Kettelkamp (Mr. Vento's attorney in the 1997 Action), all claiming some interest in the

proceeds of the Judgments secured by the Letter of Credit. (Affidavit of David Stark at ¶ 6, *Appendix N at p. 40*). Because these claims might have exposed CNB to multiple liability, CNB invoked the provisions of Colo. R. Civ. P. 22 regarding interpleader.

On December 29, 1995, CNB filed an action in the Denver Probate Court, styled *Colorado National Bank v. Joseph A. Vento, Linda Saunders, Personal Representative of the Estate of Cecilia DeFellippie, Irene Coulter, Richard G. Vento, Angelina Vento, Marihelen Vento, and Wesley C. Kettelkamp, Jr.*, Case No. 95PR2379 ("the Interpleader Action") as a means of resolving the competing claims.

On January 3, 1996, Judge C. Jean Stewart (a respondent in this appeal), presiding over the Denver Probate Court, entered the Interpleader Order directing CNB to transfer approximately $4.4 million to a bank account in the name of the Denver Probate Court f/b/a Vento Beneficiaries, representing the amount of the Judgments, including interest accrued through January 3, 1996. The Interpleader Order provided that "upon transfer of the Judgment amount . . . CNB shall be considered to have satisfied the Judgment. . . . " CNB deposited that sum, disclaiming any further interest in the funds. The Interpleader Order stated in pertinent part:

> D. Pursuant to C.R.C.P. 22 the Defendants, and each of them, are restrained and enjoined from instituting or prosecuting in any court of the state any action against CNB, wherein the Defendants or any of them, in any manner, seek to recover the amount of the Judgment or any part thereof, to execute on the Judgment, . . . to execute on any asset of CNB, or to recover any

> damages for failure of CNB to deliver funds to any of the Defendants to satisfy the Judgment.

(*Petition for Writ of Certiorari ["Petition"], App. B-2, pp. 30-32*).

Mr. Vento has tried unsuccessfully to appeal and overturn the Interpleader Order many times, including six separate requests to the Denver Probate Court (see footnote 2, *supra*). Most of these motions were considered and denied on April 26, 1996 by a second judge in the Interpleader Action after Judge Stewart recused herself at Mr. Vento's request. Mr. Vento's appeals to the Colorado Supreme Court and Colorado Court of Appeals were likewise dismissed (see footnote 3, *supra*).

In sum, CNB satisfied the Judgments by depositing $4.4 million into a court-supervised bank account, pursuant to the Interpleader Order. The defendants in the Interpleader Action, which includes Mr. Vento, were prohibited by the Interpleader Order from suing CNB for damages by reason of CNB's failure to pay the amount of the Judgments directly to Mr. Vento and the heirs of Ms. DeFellippie. The present action is Mr. Vento's latest attempt to attack the validity of the Interpleader Order. Mr. Vento has now turned to the federal court system, asserting claims under 42 U.S.C. § 1983 against Judge Stewart, CNB, and attorneys who filed and participated in the Interpleader Action.

In his discussion of the district court's opinion, Mr. Vento omitted the final reason for the district court's findings, which took into account the procedural history set out above:

> The complaint appears to be nothing more than an attempt to relitigate issues already litigated in the state courts. This lawsuit meets the standards of meritless, frivolous, and vexatious litigation under Fed. R. Civ. P. 11 and 42 U.S.C. § 1988.

(*Petition, App. B-1, page 28.*)

Mr. Vento likewise omitted the third reason the Court of Appeals for the Tenth Circuit affirmed the District Court's decision:

> [Petitioner's] arguments to this court demonstrate only a disagreement with the state court's decisions. Therefore, we invoke the *Rooker-Feldman* doctrine, which prohibits federal district courts from hearing federal claims whose only purpose is to obtain review of state court judgments . . . "

(*Petition for Certiorari, App. A, pp. 23-24* (citing *Kiowa Indian Tribe v. Hoover*, 150 F.3d 1163, 1165 (10th Cir. 1998)).)

Incredibly, Mr. Vento continues to improperly use the federal court system to contest the Interpleader Order, despite the fact that he was awarded approximately $2.75 million in the Interpleader Action on June 7, 1997, and collected the funds from the registry of the Denver Probate Court on October 15, 1997. (Certified Copy of the Registry of Court in Case No. 95 PR 2379, *Appendix H p. 27*).

ARGUMENT AGAINST GRANTING CERTIORARI

A. There Is No Basis For Granting The Writ Of Certiorari Under Rule 10, As There Is No Conflict Between Federal Appellate Courts On An Important Question Of Federal Law.

Review on a writ of certiorari is not a matter of right, but of judicial discretion, and is not granted lightly. A petition for a writ of certiorari will be granted only for "compelling reasons." These include a conflict between the circuit courts of appeals or between a circuit court of appeals and a state court of last resort "on the same important matter," a conflict between state courts of last resort on a federal question, or a decision by a state court of last resort or a federal court of appeals on "an important question of federal law " that has not been settled by this Court. S. Ct. R. Civ. P. 10.

The centerpiece of Petitioner's Petition is his claim that the Court of Appeals for the Tenth Circuit improperly applied a "heightened pleading standard" to his complaint. Petitioner argues that the Court of Appeals for the Tenth Circuit's application of "heightened pleading standards" to § 1983 actions "is inconsistent with the rulings of other United States Courts of Appeal." (*Petition at 6.*) Petitioner, however, never raised this claim before the court of appeals, and cannot raise it now.

1. Petitioner Failed To Raise The "Heightened Pleading Standard" Argument Below, And May Not Raise It For The First Time Before This Court.

As a preliminary matter, the Court may not consider Petitioner's arguments regarding the "heightened pleading standard," because the arguments were not raised in the appeal below. Petitioner made four arguments in his briefs before the Court of Appeals for the Tenth Circuit: first, the complaint stated a claim for relief and should not have been dismissed; second, Judge Stewart did not have jurisdiction to enter the Interpleader Order and declare the Judgments satisfied; third, the District Court was wrong in finding no conspiracy to violate Petitioner's rights among the various attorneys, CNB and Judge Stewart; and fourth, Petitioner stated a claim for relief under § 1983 because he was deprived of property through state action without substantive due process. Petitioner *never* raised any issue in the Court of Appeals for the Tenth Circuit regarding the "heightened pleading standard" which forms the centerpiece of his Petition before this Court. *See* Appellant's Opening Brief in the Court of Appeals for the Tenth Circuit ("Opening Brief") (*Appendix O at pp. 44-85*).

This Court has stated its "normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review here." *Neely v. Martin K. Eby Const. Co.*, 386 U.S. 317, 87 S. Ct. 1072, 1081, 18 L. Ed.2d 75 (1967), *rehearing denied*, 386 U.S. 1027, 87 S. Ct. 1366, 18 L. Ed.2d 471 (1967). *See also G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 102 S. Ct. 1137, 1144, 71 L. Ed.2d 250 (1982) ("In this

Court, petitioner has attempted to put forward a new due process argument . . . Because petitioner did not present this argument to the Court of Appeals, we do not address it."). Because Mr. Vento did not properly raise the "heightened pleading standard" argument before the Court of Appeals for the Tenth Circuit, the Court may not consider it now.

2. There Is No Inconsistency Between Federal Appellate Courts On The Issue Of The Heightened Pleading Standard.

To support his untimely claim, Petitioner cites two cases from the Court of Appeals for the Ninth Circuit and this Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed.2d 517 (1993). Each of these cases is distinguishable from the present action. There is no inconsistency, apparent or otherwise, between the Court of Appeals for the Tenth Circuit's ruling in the decision below and other cases involving pleading standards for § 1983 claims.

In *Leatherman*, homeowners in Texas brought a civil rights claim under 42 U.S.C. § 1983 against local law enforcement officers acting in their official capacity, as well as the county and two municipal corporations that employed the officers. The homeowners maintained that the officers had violated their Fourth Amendment protections against unreasonable searches and seizures, and based liability against the municipalities on the failure of such entities to adequately train the officers. *Id.* at 165.

Their complaint was dismissed by the United States District Court for the Northern District of Texas for failure to meet the "heightened pleading standard" for municipal liability, and the Court of Appeals for the Fifth Circuit affirmed. This Court determined that courts could not apply a heightened pleading standard to § 1983 claims against municipal corporations. *Id.* at 167-168.

Petitioner reads the decision in *Leatherman* to "suggest[ ] strongly that any heightened pleading standard is impossible to square with the Federal Rules of Civil Procedure and is therefore invalid and is not permissible." (*Petition at 7.*) This is an utterly inaccurate reading of the case. First, the Court in *Leatherman* acknowledged that Rule 9(b) of the Federal Rules of Civil Procedure requires a heightened pleading standard in certain circumstances, such as when the plaintiff alleges fraud or mistake. 507 U.S. at 168. Second, and more importantly, the Court specifically limited its holding to § 1983 claims brought against municipalities. The Court explicitly discussed the difference between a municipal government and its officials, and stated that it had "no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." *Id.* at 167. Lower courts have seized upon this phrase to limit the *Leatherman* holding and require or permit heightened pleading for cases brought against government officials in an individual capacity. *See, e.g., McCain v. Scott*, 9 F. Supp.2d 1365, 1369 (N.D. Ga. 1998); *Harris v. District Bd. of Trustees of Polk Community College*, 981 F. Supp. 1459, 1461-62 (M.D. Fla. 1997); *Arrington v. Dickerson*, 915 F. Supp. 1503, 1512-1513

(M.D. Ala. 1996); *Feliciano v. DuBois*, 846 F. Supp. 1033, 1042 (D. Mass. 1994).

Petitioner cites two decisions of the Court of Appeals for the Ninth Circuit to support his contention that the *Leatherman* doctrine applies to all § 1983 claims, regardless of whether the defendant is an individual or a municipality. Citing *Housley v. United States*, 35 F.3d 400 (9th Cir. 1994) and *Kimes v. Stone*, 84 F.3d 1121 (9th Cir. 1996). Petitioner concludes without further explanation that "these courts have adopted the view that *Leatherman* ought to mark the absolute end of the 'heightened pleading' requirement." (*Petition at 6-7.*) Once again, a careful examination of the cases demonstrates that Petitioner's reading is untenable.

Housley involved a *pro se* plaintiff who accused federal agents of an illegal search and seizure. The court of appeals held that a heightened pleading standard was inappropriate because the plaintiff did not allege subjective intent on the part of the defendants. The court of appeals distinguished the facts of *Housley* with those of *Branch v. Tunnell*, 937 F.2d 1382 (9th Cir. 1991) (*Branch I*). In *Branch I*, the Court of Appeals for the Ninth Circuit held "that when subjective intent is an element of the constitutional tort action and qualified immunity is plead, the plaintiff is subject to a heightened pleading standard which requires nonconclusory allegations setting forth specific evidence of unlawful intent." *Housley*, 35 F.3d at 401. Because the *Branch I* decision remains good

law,[7] *Housley* does nothing to suggest the "absolute end" of the heightened pleading requirement, as Petitioner claims. Indeed, the distinction made in *Housley supports* the position of CNB and its co-defendants, since Petitioner is alleging subjective intent of the defendants to conspire against him.

Nor is *Kimes* particularly supportive of Petitioner's core assertion that *Leatherman* should mark the "absolute end" of the heightened pleading requirement. The Court of Appeals for the Ninth Circuit in *Kimes* did not even mention *Leatherman*. In *Kimes*, a case procedurally very similar to the present case, the plaintiff sued a state judge and two attorneys under § 1983, alleging conspiracy to overturn a verdict setting aside a decedent's will. The court of appeals rejected any claim against the judge as barred by judicial immunity. *See Kimes*, 84 F.3d at 1126. The attorneys put forth two arguments in their defense. First, they claimed litigation immunity under the California Rules of Civil Procedure. Second, they argued that Kimes' pleadings were insufficient under Rule 8(a) of the Federal Rules of Civil Procedure. The Court spent the majority of its time addressing the attorney immunity issue, only mentioning the pleadings argument at the very end of the opinion. Even then the pleadings discussion seems almost an afterthought, clearly secondary to the more substantial discussion of attorney liability. *Id.* at 1129. While the bare text of *Kimes* seems to require only regular pleading for § 1983 claims, the context of the

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[7] The Court of Appeals for the Ninth Circuit reaffirmed the *Branch I* doctrine after *Leatherman* was decided. *See Housley*, 35 F.3d at 401 n. 3.

discussion and the court of appeals' failure to even mention, much less reject, heightened pleading significantly weakens its persuasive value.

Finally, Petitioner cites *Monroe v. Pape*, 365 U.S. 167, 171, 81 S. Ct. 473, 476 (1961)[8] for the proposition that the "[a]llegation of facts constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment satisfies to that extent the requirement" of 42 U.S.C. § 1983. This may be the case, but both the quote and the general discussion in *Monroe* relate to the requirements to allege a cause of action under the statute, not the requirements to plead with sufficient specificity. The Court in *Monroe* was determining whether the plaintiff's claims were theoretically actionable, not whether they were well-pleaded. Put another way, the passage from *Monroe* discusses only what *can* be alleged under § 1983, not *how* it is to be alleged.

Because there is no conflict between the Courts of Appeals for the Ninth and Tenth Circuits, and because Petitioner has failed to timely raise this issue, the Petition for Writ of Certiorari must be denied.

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[8] *Monroe* was overruled by *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed.2d 611 (1978) on grounds related to municipal liability under § 1983.

B. The Court Of Appeals For The Tenth Circuit Correctly Ruled That The District Court Lacked Subject Matter Jurisdiction Over An Appeal Of A State Court Ruling And Properly Dismissed Petitioner's Complaint.

Federal district courts do not have appellate jurisdiction over state court decisions. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 150, 68 L. Ed.2d 362 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 1315, 75 L. Ed.2d 206 (1983). This has become known as the *Rooker-Feldman* doctrine. *See, e.g., Musselwhite v. State Bar of Texas*, 32 F.3d 942, 946 n. 11 (5th Cir. 1994), *cert. denied*, 515 U.S. 1103, 115 S. Ct. 2248, 132 L. Ed.2d 256 (1995). The *Rooker-Feldman* doctrine precludes Petitioner from contesting the Interpleader Order entered by the Denver Probate Court in the federal courts. "The reach of the *Rooker-Feldman* doctrine is substantial. It is not limited to the decisions coming from the state's highest court." *Dubinka v. Judges of Superior Court*, 23 F.3d 218, 221 (9th Cir. 1994). The doctrine applies to both interlocutory and final state court decisions. *Gentner v. Shulman*, 55 F.3d 87, 89 (2d Cir. 1995).

The present action is precisely the type of action the *Rooker-Feldman* doctrine was designed to prevent. All of Petitioner's claims are based on the alleged impropriety of the proceedings and rulings in the Interpleader Action, and the relief which Petitioner seeks is, in effect, a reversal of the Interpleader Order. The Interpleader Order allowed CNB to satisfy the Judgments by depositing the full amount of the Judgments into the registry of the Denver Probate Court. The Interpleader Order also prohibited Petitioner from "instituting or prosecuting in any

court of this state any action against CNB . . . to recover the amount of the Judgment or any part thereof. . . . " (*Petition, App. B-2, pp. 31-32.*) As a basis for this action, Petitioner claims that the proceedings in the Interpleader Action deprived him "of his property and rights to property without appropriate process, that is, the right to execute and collect on the judgment granted him by the Pueblo District Court on June 15, 1993." (*Petition, App. D-1, pp. 52-53.*) It is clear that this action is nothing more than an attempt to overturn the state court's decision in the Interpleader Action and recover damages against CNB, and as such, it is prohibited.

Further, the fact that Petitioner has framed his allegations in the context of a § 1983 suit did not provide the district court with subject matter jurisdiction, because "[a] plaintiff may not seek a reversal of a state court judgment simply by casting the complaint in the form of a civil rights action." *Ritter v. Ross*, 992 F.2d 750, 754 (7th Cir. 1993), *cert. denied*, 510 U.S. 1046, 114 S. Ct. 694, 126 L. Ed.2d 66 (1994) (quoting *Hagerty v. Succession of Clement*, 749 F.2d 217, 220 (5th Cir. 1984), *cert. denied*, 474 U.S. 968, 106 S. Ct. 333, 88 L. Ed.2d 317 (1988)). Moreover, Petitioner has already raised these constitutional claims in the Interpleader Action itself, with no success.[9] "Where

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[9] The following pleadings are listed in the Excerpts from the Certified Record of Denver Probate Court, *Appendix A at pp. 1-4*: Mr. Vento's Motion for Court to Reconsider and Set Aside its Order for Contempt and the Contempt Citation; Amendment of Answer by Joseph A. Vento; Objection by Defendant Joseph A. Vento to CNB Being Discharged From All Further Liability and Dismissed From This Case; Affirmatively for a Motion for an Order to Dismiss This Case, or, Alternatively, for an Order

a constitutional issue could have been reviewed on direct appeal by the state appellate courts, a litigant may not seek to reverse or modify the state court judgment by bringing a constitutional claim under 42 U.S.C. § 1983." *Anderson v. State of Colorado*, 793 F.2d 262, 263 (10th Cir. 1986).

C. Judge Stewart Had The Authority And Jurisdiction To Enter The Interpleader Order.

Petitioner next argues that Judge Stewart lacked the jurisdiction to enter the Interpleader Order, and that it was error for the Court of Appeals for the Tenth Circuit to hold otherwise. This is simply another attempt to have a federal court review the decision of a state court, and is impermissible under the *Rooker-Feldman* doctrine. In addition, Petitioner has not identified any conflicting decisions of the federal circuit courts of appeals, or of state courts of last resort, regarding this issue. Nor has Petitioner articulated any other reason why this Court should consider this issue under its rules of procedure. Should the Court wish to consider this argument, however, the Court will find Petitioner's position to be insupportable.

The Colorado legislature has vested the Denver Probate Court with jurisdiction "to determine every legal and equitable question *arising out of or in connection with* express trusts." Colo. Rev. Stat. § 13-9-103(5) (emphasis added). Petitioner's argument that this Court should

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Vacating or Dissolving the Preliminary or Temporary Injunction.

overturn the Court of Appeals for the Tenth Circuit's ruling on the jurisdiction issue largely consists of his denial that the Interpleader Action "arose out of or was connected with" anything having to do with an express trust. For example, Petitioner states in his Opening Brief that "[n]o money owed as a result of the Pueblo District Court judgment belonged to an express trust." (*Appendix O at p. 71.*) However, the proceeds from the Judgment *arose from* Petitioner's claims that CNB had mismanaged the Joseph A. Vento Trust and the trust property. In addition, CNB initiated the Interpleader Action because of competing claims from other trusts which were co-owners of the Vento trust property, demonstrating that the Interpleader Action was *connected with* express trusts. In that light, the Denver Probate Court had jurisdiction under Colo. Rev. Stat. § 13-9-103(5) to address in the Interpleader Action the legal questions associated with the $4.4 million Judgment.

Petitioner further asserts that Colo. R. Civ. P. 22 prevents the Denver Probate Court from maintaining jurisdiction over an interpleader action because the rule provides that *a district court* may enter its order in any civil interpleader action. Consequently, according to Petitioner, the Denver Probate Court could not have ruled on such a matter because it is not a district court. (*Petition at p. 13.*) But Petitioner ignores Colo. R. Civ. P. 1, which states that the rules of civil procedure are applicable to probate courts in the City and County of Denver. Thus, the Rule 22 interpleader procedures apply to the Denver Probate Court.

Petitioner argues, however, that Colo. R. Civ. P. 82 provides that the rules "shall not be construed to extend

the jurisdiction of any court," and thus Rule 22 cannot be expanded to encompass probate courts. (Opening Brief at 25, *Appendix O at p. 75*). But, in light of Rule 1, there is no extension of jurisdiction of the Denver Probate Court beyond what the legislature and the Rules already grant. Consequently, the Denver Probate Court acted within its jurisdiction when it heard the Interpleader Action on January 3, 1996 and subsequently entered its Interpleader Order.

D. Petitioner Failed To State Allegations Sufficient To Sustain A § 1983 Claim Against CNB Or Mr. Stark.

In his Complaint, Petitioner claimed that he was deprived of his constitutional rights under 42 U.S.C. § 1983 by (1) the initiation of the Interpleader Action by CNB; (2) the Denver Probate Court's order allowing CNB to satisfy the Judgments by depositing the $4.4 million into the registry of the court; and, (3) the manner in which the January 3, 1996 hearing, at which he was represented by counsel, was conducted. (*Petition, App. D-1, pp. 47-52 ¶¶ 21-24, 26.*) The Court of Appeals for the Tenth Circuit ruled that Petitioner's "[c]onclusory allegations of conspiracy are insufficient to state a valid § 1983 claim." (citing *Hunt v. Sparkman*, 17 F.3d 1263, 1266 (10th Cir. 1994)) (*Petition, App. A, p. 23.*) Again, there exists no basis under the Supreme Court's rules of procedure for the Court to consider this issue on a Petition for Writ of Certiorari, nor has Petitioner even attempted to articulate such a basis.

To state a claim for relief under § 1983, Mr. Vento must show that the alleged wrongful conduct at issue

was committed by a defendant acting under color of state law, and that the conduct deprived the plaintiff of rights, privileges or immunities protected by the Constitution of the United States. *See Boulter v. Jordan*, 733 F. Supp. 85, 87 (D. Colo. 1990). Because Mr. Vento's allegations, even if taken as true, cannot satisfy either of these requirements, his Complaint against CNB and Mr. Stark must fail.

1. Mr. Vento Cannot Demonstrate That CNB Or Mr. Stark Acted "Under Color Of State Law"

This Court has set forth a two-part inquiry to determine whether a private individual acts under color of state law for purposes of § 1983. First, "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible," and second, "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). To fulfill the state actor requirement, a plaintiff must demonstrate that the actions of the private defendant are "fairly attributable" to the state. *Lee v. Town of Estes Park*, 820 F.2d 1112, 1115 (10th Cir. 1987). Thus, the Petitioner must show "the existence of a significant nexus of entanglement between [the State official] and the private party in relation to the steps taken by each to fulfill the objects of their [alleged] conspiracy." *Norton v. Liddel*, 620 F.2d 1375, 1380 (10th Cir. 1980). Nexus may be established by a showing that "the state official and private person(s) reached an understanding between themselves

to deprive the plaintiff of rights guaranteed under the Constitution." *Boulter*, 733 F. Supp. at 87.

Petitioner's § 1983 claim against CNB and Mr. Stark fails as a matter of law. Petitioner has not alleged, and cannot allege consistent with Fed. R. Civ. P. 11, any facts which could demonstrate that Mr. Stark or CNB are "state actors," nor has he adequately alleged that a "conspiratorial nexus" existed between CNB, Mr. Stark, and Judge Stewart. Petitioner did not allege even one instance where Mr. Stark or CNB reached any understanding with Judge Stewart to deprive Petitioner of his constitutional rights. In fact, Petitioner did not suggest, nor can he, that there was any communication whatsoever between Mr. Stark, CNB, and Judge Stewart outside of the January 3, 1996 hearing. Instead, Petitioner summarily claimed that "[t]he actions of the defendants through the Denver Probate Court" violated § 1983. (*Petition, App. D-1, p. 52.*)

Such vague and unsubstantiated allegations are insufficient to withstand a motion to dismiss. *See, e.g. Boulter*, 733 F. Supp. at 87. Where a plaintiff seeks to establish the requisite "state action" through allegations of conspiracy between a judge and private parties, the plaintiff must do more than assert conclusory allegations; he must "specifically present facts tending to show agreement and concerted action." *Sooner Products Co. v. McBride*, 708 F.2d 510, 512 (10th Cir. 1983). In Petitioner's Opening Brief, he listed seven "overt acts" which, he believes, indicate a conspiracy between the Defendants. (Opening Brief at 18-19, *Appendix O at pp. 67-68.*) These "overt acts" are nothing more than routine events occurring during the course of litigation which could be

present in any interpleader action. They are not unique, and certainly not "clandestine" as Mr. Vento asserts.

As additional support that there was concerted action between the Defendants, Mr. Vento maintains that there was absolutely no reason why CNB needed to interplead the funds in the first place, and that "there is nothing in the record to show that there were claims against CNB exposing it to double or multiple liability." (Opening Brief at 20, *Appendix O at pp. 69-70.*) This is simply untrue, as set out in the factual discussion above.

Nor can Mr. Vento's § 1983 claim survive based upon an argument that Mr. Stark's efforts on behalf of CNB in a state court proceeding constitute state action. Lawyers do not act under color of law solely by engaging in private litigation on behalf of their clients. *Polk County v. Dodson*, 454 U.S. 312, 325, 102 S. Ct. 445, 70 L. Ed.2d 509 (1981); *Brown v. Chaffee*, 612 F.2d 497, 501 (10th Cir. 1979); *see also Lindley v. Amoco Prod. Co.*, 639 F.2d 671, 673 (10th Cir. 1981).

2. CNB And Mr. Stark's Participation In The Interpleader Action Cannot Form The Basis Of A § 1983 Action

Petitioner's claims amount to nothing more than assertions that Mr. Stark and CNB wrongfully used state court proceedings to obtain a ruling unfavorable to Mr. Vento. Where, as here, the conduct complained of consists of "private litigation in which the state does no more than furnish the forum and has no interest in the outcome," the plaintiff cannot maintain a cause of action under § 1983. *Torres v. First State Bank*, 588 F.2d 1322, 1326 (10th

Cir. 1978) (quoting *Hill v. McClellan*, 490 F.2d 859, 860 (5th Cir. 1974), *overruled on other grounds, Sparks v. Duval County Ranch Co.*, 604 F.2d 976 (5th Cir. 1979), *affirmed*, 449 U.S. 24, 101 S. Ct. 183, 66 L. Ed.2d 185 (1980)).

To state a claim under the theory that Mr. Stark and CNB used the state judicial process in violation of § 1983, Petitioner is required to show that the state court proceedings were a "complete nullity." *Torres*, 588 F.2d at 1326. In other words, Petitioner must plead specific facts that indicate the judge and defendants conspired to violate his right to due process and consequently rendered void any judicial proceeding. However, Petitioner failed to allege any facts which indicate that Mr. Stark or CNB "obtained significant aid" from Judge Stewart or otherwise received special treatment which rendered the judicial proceedings void. *See Lugar*, 457 U.S. at 937.

Petitioner argues that CNB and Mr. Stark are state actors because they acted jointly with Judge Stewart to deprive him of property. He contends that these Defendants interfered with his property interest simply by *bringing the Interpleader Action*. This line of reasoning would lead to the absurd result that all lawsuits would constitute illegal state action, which would in turn choke the courts with § 1983 claims. Petitioner's characterization of CNB's and Mr. Stark's roles in the Interpleader Action is improper and illogical, and cannot form the basis of a valid § 1983 claim. The § 1983 claim against Mr. Stark and CNB was properly dismissed.

E. Petitioner Has Not Been Denied Due Process Because He Has Regularly Invoked The Jurisdiction Of Colorado State Courts

As a separate claim, Petitioner alleged that the Respondents violated his due process rights through the Denver Probate Court. The claim that Petitioner has been deprived of the right to litigation is absurd. In addition to the instant action, Petitioner has litigated the issue of due process, along with the propriety of jurisdiction, venue, and the Interpleader Action itself, in no fewer than six separate pleadings in the Interpleader Action, two actions in the Pueblo District Court, and appeals from every one of those adverse decisions.[10]

A party cannot have been denied due process if he regularly invoked the jurisdiction of a state court, the case was tried, and a judgment was rendered and appealed. *Bottone v. Lindsley*, 170 F.2d 705, 707 (10th Cir. 1948), *cert. denied*, 336 U.S. 944, 69 S. Ct. 810 (1949) (affirming dismissal of action under §§ 42 and 43 of the Civil Rights Act against the litigants, lawyers and judge who participated in a case that the appellant unsuccessfully brought in Colorado state court). *See also, Williams v. Texaco, Inc.*, 165 B.R. 662, 674 (D.N.M. 1994) (party was afforded due process in the determination of whether sanctions should be imposed because party had adequate notice and opportunity to respond, and court's decision not to hold hearing on whether sanctions should be imposed was matter within sound discretion of the court); *Sexton v. Barry*, 233 F.2d 220, 224 (6th Cir. 1956),

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[10] See footnotes 2-5, *supra*.

cert. denied, 352 U.S. 870, 77 S. Ct. 94 (1956) (party has not been denied due process merely because he lost his case where party had a full hearing in three state courts on all questions presented). Indeed, the Court of Appeals for the Tenth Circuit has noted that "[t]he doctrine of due process does not confer the right to litigate the same question twice." *Bottone*, 170 F.2d at 707.

In its April 1, 1997 Summary Judgment Order, the Pueblo District Court ruled that Mr. Vento's claims against CNB were barred by collateral estoppel precisely because he had litigated the issues so many times:

> This court finds that the Order on Interpleader Petition is a "final judgment" as to the issues of whether CNB has satisfied the judgment and whether CNB's institution of the Interpleader Action constituted an anticipatory repudiation of the letter of credit for purposes of collateral estoppel. Additionally, the Court finds that the Plaintiff is a party in the Interpleader Action, that the Plaintiff has fully litigated the same argument in the Interpleader Action, having made five separate requests to the Denver Probate Court to overturn the Denver Probate Court order on interpleader and having applied to the Colorado Supreme Court for writs of prohibition and mandamus against the Denver Probate Court, which was subsequently denied, and by having unsuccessfully appealed an April 26, 1996, order of the Denver Probate Court which affirmed its January 3, 1996, Interpleader Order.

(*Appendix E at pp. 19-20.*[11]) As the Pueblo District Court recognized, Petitioner has had several opportunities to

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[11] Petitioner has previously argued, without any legal basis, that the District Court was somehow prohibited from considering orders entered by, and pleadings filed in, the state

litigate the allegations asserted here and has, in fact, fully litigated these issues in Colorado state courts. His claims that CNB and Mr. Stark somehow violated his due process rights were appropriately dismissed.

CONCLUSION

Petitioner has articulated no basis for this Court to consider his Petition. Unhappy with the rulings issued by Colorado's state courts, Petitioner has resorted to filing a frivolous and groundless federal suit. Petitioner filed his complaint, and now this appeal, with complete disregard for basic principles of law which indisputably prohibit this action. CNB and Mr. Stark ask this Court to deny the Petition for Writ of Certiorari.

DATED September 13, 1999.

Respectfully submitted,

KENNETH B. SIEGEL
(Counsel of Record)
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Counsel for Respondents U.S. Bank, f/k/a Colorado National Bank and David W. Stark

---

courts (Opening Brief at 12, *Appendix O at p. 62*). The District Court was permitted to take judicial notice of those orders and pleadings pursuant to F.R.E. 201, and the evidence was properly before the Court pursuant to F.R.E. 803(8).

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APPENDIX A

EXCERPTS FROM THE
CERTIFIED COPY OF REGISTER OF ACTIONS FOR
CASE NO 95 PR 2379 PROBATE COURT, CITY AND
COUNTY OF DENVER, COLORADO
COLORADO NATIONAL BANK v.
JOSEPH A. VENTO et al.

* * *

FILE DATE EVENT DESCRIPTION
SCHD DATE TIME ROOM

01/08/1995 Miscellaneous
FLG FEDWIRE WIRE ADVICE STATEMENT OF DEPOSIT FM NORWEST BANK COLORADO, NA:
FILE DATE EVENT DESCRIPTION
SCHD DATE TIME ROOM
$4,352,761.56 /MW

12/29/1995 Filing Other
VERIFIED MOTN FOR LEAVE TO DEPOSIT MONEY WITH COURT PAID FOR INJUNCTIVE RELIEF PURSUANT TO RULE 22 C R C P

[SEAL]

* * *

FILE DATE EVENT DESCRIPTION
SCHD DATE TIME ROOM

01/03/1996 Order
FINDINGS ASF. ORD: A. CNB DRCTD T-TRNSFR T-ACCT ASF AT NORWEST SUM OF APPROX $4,400,000 ASF. B. ACCT T-B HELD AT INTEREST IN NAME OF DEVER PROB CT F/B/O VENTO BENEFICIARIES ASF. C. UPON TRNSFR OF JDGMNT AMT AND SUBJ ONLY T ADJSTMNTS OF CALCULATION CNB SHL B-CONSIDERED T-HAVE STSFD THE JDGMNT. THIS SATISFACTION CANNOT B-CONSTRUED T-HINDER OR SHL IT B-CONSTRUD BY ANY CT T-HINDER ANY OTHR

CLMS AGAINST CNB. D. DENDNTS RSTRND FROM INSTITUTING OR PROSECUTING ANY ACTION AGAINST CNB WHEREIN THEY SEEK T-RECOVER AMT OF JGMNT ASF

[SEAL]

* * *

01/08/1996 Miscellaneous
FILE DATE EVENT DESCRIPTION
SCHD DATE TIME ROOM
MOTN TO DISQUALIFY OR ALTERNATIVELY FOR RECUSAL AND MOTN TO VACATE JAN
03 ORDR ON INTERPLEADER CERT/SERVICE EXHB (A)-(D)
MOTN TO DISQUALIFY OR ALTERNATIVELEY [sic] FOR RECUSAL CERT/SERVICE EXHB (A)-(D)
MOTN FOR CHANGE OF VENUE CERT/MLG EXHB (A)-(B) /KLA

[SEAL]

* * *

01/24/1996 Miscellaneous
SECOND MOTN TO DISQUALITY OR ALTERNATIVELY FOR RECUSAL CERT/MLG #1 EXHB (A)-(B)
MOTN TO DISMISS CROSS CLAIM RENEWAL OF MOTN FOR CHANGE OF VENUE AND RECITATION OF AUTHORITY CERT/MLG #1-#4

[SEAL]

* * *

02/08/1996 Miscellaneous
DEFENDANTS JOSEPH VENTO AND WESLEY C KETTELKAMP JRS MOTN FOR RELIEF FROM JANUARY 3 ORDR ON INTERPLEADER PURSUANT TO CRCP CERT/SERVICE EXHB (A)-(C)

[SEAL]

* * *

FILE DATE EVENT DESCRIPTION
SCHD DATE TIME ROOM

04/25/1996 Miscellaneous
MOTN FOR CONTINUANCE OF APRIL 26, 1996 HRG
BY PHILLIP D BARBER
MOTN FOR LEAVE TO W/DRAW
/KLA

04/25/1996 Hearing 05/14/1996 08:00 AM 2

Judicial Officer ..... : SANDRA FRANKLIN
Length ..... : 1.00 Hour(s)
Status ..... : HELD – Hearing Held
Calendar Note..... : MOTN W/DRA

05/13/1996 Order
ORD: VENTO'S MOTNTO DISMISS IS DENIED
ORD: MOTN FOR ORDR DIRECTING ISSUANCE OF CONT CITN IS DEFERRED
ORD: MOTN FOR RELIEF FROM ORDR OF 01-03-96 IS DENIED
ORD: MOTN FOR EXT OF TIME TO RSPD TO CROSS CLAIM IS GRNTD
/PRO

[SEAL]

* * *

09/26/1996 Miscellaneous
CPR/CPR VENTO, JOSEPH A
FILE DATE EVENT DESCRIPTION
SCHD DATE TIME ROOM
AMENDMENT OF ANSWER BY JOSEPH A VENTO
CERT/MLG
/KLA

[SEAL]

* * *

FILE DATE EVENT DESCRIPTION
SCHD DATE TIME ROOM

10/21/1996 Miscellaneous
CPR/CPR VENTO, JOSEPH A
OBJEC BY DEFENDANT JOSEPH A VENTO TO CNB BEING DISCHARGED FROM ALL FURTHER LIABILITY AND DISMISSED FROM THIS CASE AFFIRMATIVELY FOR A MOTN FOR AN ORDR TO DISMISS THIS CASE OR ALTERNATELY FOR AN ORDR VACATING OR DISSOLVING THE PRELIMINARY OR TEMPORARY INJUNCTION CERT/MLG /KLA

[SEAL]

* * *

12/13/1996 Minute Order (print)
JUDGE: RICE CLERK: TRG REPORTER: K. RINK
PARTIES APPR RE MOTNS HRG
HEARING HELD
ORD: DEFT KETTELKAMP'S MOTN FOR LEAVE TO ASSERT COUNTERCLAIMS AGAINST PTF IS GRANTED; KETTELKAMP'S COUNTERCLAIMS AGAINST PTF CNB ARE DEEMED FILED
ORD: THE PARTIES' JOINT MOTN FOR MODIFICATION OF CMO IS GRNTD
ORD: DEFT VENTO'S MOTN TO DISMISS CLAIMS IS DENIED
ORD: DEFT SAUNDERS' MOTN TO COMPEL DEFT VENTO TO RESPOND TO DISC IS GRNTD
*WORDS (4) (CC ALL PARTIES OF RECORD) /PRO

[SEAL]

* * *

APPENDIX B

SUPREME COURT, STATE OF COLORADO
CASE NO. 96SA241
ORIGINAL PROCEEDING, PROBATE COURT, CITY & COUNTY OF DENVER,
95PR2379

ORDER OF COURT

JOSEPH A. VENTO,

Petitioner,

v.

THE PROBATE COURT IN AND FOR THE CITY AND COUNTY OF DENVER, STATE OF COLORADO, and THE HONORABLE C. JEAN STEWART AND NANCY E. RICE, the Judges thereof,

Respondents.

Upon consideration of the Petition for Writs in the Nature of Prohibition and Mandamus filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JUNE 27, 1996.

[SEAL]

cc:

Joseph A. Vento
102 S. Tejon, Suite 1100
Colorado Springs, CO 80903

The Honorable Nancy E. Rice
Denver District Court
City and County Building
1437 Bannock Street
Denver, CO 80202

The Honorable C. Jean Stewart
Probate Judge
City and County Building
1437 Bannock Street, Suite 230
Denver, CO 80202

Clerk of the Probate Court
Denver Probate Court
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APPENDIX C

(Filed Aug. 1, 1996)

COURT OF APPEALS, STATE OF COLORADO

[cd]

Case No. 96 CA 1298

[or]

MOTION TO DISMISS APPEAL

JOSEPH A. VENTO,
Defendant-Appellant

v.

COLORADO NATIONAL BANK, Plaintiff-Appellee,

and

IRENE C. COULTER, RICHARD G. VENTO, ANGELINA VENTO, MARIHELEN VENTO and LINDA SAUNDERS, Personal Representative of the Estate of Cecilia DeFellippie, Defendants-Appellees

v.

JOSEPH A. VENTO,
Defendant-Appellee

[COPIES MAILED TO COUNSEL OF RECORD
Tri. Ct. Clerk
ON 8/9/96
BY dh
COLORADO COURT OF APPEALS]

(X) GRANTED
( ) DENIED
Aug. 9, 1996
Appeal dismissed with prejudice.
Plank, Hume, Jones, JJ.
By the Court
Colorado Court of Appeals]

Defendants-Appellees, Irene C. Coulter, Richard Vento, Angelina Vento, and Marihelen Vento, by and

through their undersigned Counsel, hereby move to dismiss the Appeal taken by Defendant-Appellant Joseph A. Vento as untimely filed in violation of C.A.R. 4(a). As grounds therefor, the Defendants-Appellees state as follows:

1. Joseph A. Vento, appearing pro-se but who is an attorney licensed to practice law in the State of Colorado (Registration No. 637), filed a Notice of Appeal on or about July 18, 1996, which expressly states that the appeal concerns only the

* * *

APPENDIX D

DISTRICT COURT, PUEBLO COUNTY, COLORADO

CASE NO. 87 CV 867 DIV. A

ORDER ON CITATION FOR CONTEMPT

(Apr. 26, 1996)

JOSEPH A. VENTO and CECILIA DE FELLIPPIE,
Plaintiffs,

v.

COLORADO NATIONAL BANK-PUEBLO,
Defendant.

This matter came on April 14, 1996, for hearing a Petition for an Order finding the Defendant Colorado National Bank, hereinafter referred to as the Bank, in contempt of Court filed on behalf of the Plaintiff Joseph A. Vento, hereinafter referred to as Vento. The Plaintiff appears to assert that the Defendant Bank is in contempt of this Court's Order of June 15, 1993 granting a money judgement to each of the Plaintiffs in the amount of $931,962.50 and this Court's Order of September 16, 1993, which permitted the Bank to file a Letter of Credit as a supersedeas bond in order to stay execution on the judgement pending appeals.

The situation giving rise to this controversy is as hereinafter set out. The Court of Appeals affirmed the trial Courts order and judgement of June 15, 1993 and the Supreme Court denied certiorari on December 11, 1995. On January 3, 1996, two days before the mandate of the

Court of Appeals issued, the Bank obtained an Order of Interpleader from the Denver Probate Court which authorized the Bank to deposit in Norwest Bank Colorado N.A. $4,400,000.00 representing the amount of the previously mentioned judgement, plus costs and interests, to be held at interest in the name of "The Denver Probate Court f/b/o Vento Beneficiaries" pursuant to the provisions of CRS 11-10.5-101 et seq. Upon such deposit, the Bank was to be deemed to have satisfied the judgement previously mentioned. In addition the above named plaintiffs, their counsel and certain other parties were enjoined from executing on said judgement or collecting on the Letter of Credit.

The Plaintiffs assert that the Bank is in contempt of this Court's Order of Judgement of June 15, 1993, by seeking interpleader in that it has deprived this Court of jurisdiction. This is an issue which can only be raised in the Denver Court to which the interpleader action has been transferred. It is up to that Court to determine if it properly has jurisdiction of the controversy. It is clear that one district court does not have jurisdiction to determine whether another district court has jurisdiction of a particular controversy. The entry of a judgement against a defendant for money damages does not prevent that defendant from seeking the relief which can be obtained pursuant to Rule 22 of the Colorado Rules of Civil Procedure (providing such defendant brings him/her self within the provisions of such rule). Or in other words, a judgment debtor who seeks relief pursuant to Rule 22 cannot be said to be in contempt of court by reason of such action.

However, the Plaintiff claims that the Bank is in contempt of court with respect to this Court's Order of September 16, 1993, by an inaccurate statement made by Bank's counsel during a hearing on the Bank's Motion for leave to file a letter of credit in lieu of a supersedeas bond. Counsel did represent to the Court at the September 16, 1993 hearing that the Defendant Bank was an independent Bank that was simply part of the Colorado National Bank system. The point being that the letter of credit was backed up by all of the assets of the entire Colorado National Bank system rather than being limited to the assets of the Colorado National Bank at Pueblo. Thus the system of banks would act in a manner similar to that of a surety for the Pueblo bank. Counsel now freely admits that he was misinformed and in error. Colorado National Bank at Pueblo is integrated into Colorado National Bank and is not an independent bank. However, an honest mistake does not constitute contempt of court. Under either set of facts, the letter of credit was indeed backed up by the assets of the entire Colorado National Bank system.

At this same hearing, the issue arose whether the Plaintiff would have to institute a separate action against the Bank in order to collect on the letter of credit. In this connection counsel for the Bank stated that the Bank was already in the jurisdiction of the Court and all the plaintiffs had to do to collect was to move the Court for an order calling the letter of credit. The order that entered on the September 16, 1993 hearing simply granted the Defendant's motion permitting it to file the Letter of Credit in lieu of a supersedeas bond; it did not forbid the Defendant from seeking interpleader in this or another

court. In order to find contempt of court based on violation of a court order, the order must clearly spell out either the required action of the forbidden action. The order of September 16, 1993, did not forbid the Defendant Bank from seeking interpleader.

IT IS THEREFOORE [sic] ORDERED THAT the Plaintiff's Petition for an Order finding the Defendant Bank in contempt of Court be and the same hereby is denied.

DONE THIS 26TH DAY OF APRIL, BY THE COURT

/s/ Patti F. O'Rourke 4-26-96
PATTI F. O'ROURKE,
SENIOR DISTRICT COURT JUDGE

xc James Littlepage
Kenneth Siegel
D. Stark
Kettlekamp 4-29-96

APPENDIX E

DISTRICT COURT, COUNTY OF PUEBLO, STATE OF COLORADO

CASE NO. 96CV31, Division A

SUMMARY JUDGMENT

JOSEPH A. VENTO, (Filed Mar. 31, 1997)

Plaintiff,

v.

COLORADO NATIONAL BANK,

Defendant.

This matter is before the Court on Plaintiff's Motion for Summary Judgment filed November 27, 1996, and Defendant's Motion for Summary Judgment filed November 14, 1996, the Court having reviewed said motions the responses and replies thereto, and having heard oral argument on March 19, 1997, DOES NOW FIND AND CONCLUDE AS FOLLOWS:

I. LEGAL STANDARD

C.R.C.P. 56(c) provides in pertinent part:

> (c) . . . [Summary judgment] shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

"Summary judgment is a drastic remedy and should be granted only upon a clear showing that there is no genuine issue as to any material fact." *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). "The existence of a difficult or complicated question of law, when there is no issue of facts, is not a bar to summary judgment." *Jones v. Dressel*, 623 P.2d 370, 373 (Colo. 1981).

II. FACTUAL AND PROCEDURAL BACKGROUND

In 1968, the Joseph A. Vento Trust, the Dominic A. Vento Trust, the Irene C. Coulter Trust and the Cecilia DeFellippie Trust became co-owners of an undivided one-quarter interest in coal mining property in Fremont County, Colorado. CNB and its predecessors (the First National Bank of Pueblo, which became Colorado National Bank-Pueblo, which became CNB) acted as the sole trustee of each of the four trusts which owned the coal mining property. On or about September 8, 1987, Plaintiff Joseph A. Vento and Cecilia DeFellippie filed an action in Pueblo District Court, 87CV867-A, against CNB's predecessor asserting breach of fiduciary duty in managing and administering their trusts and the trust property. On June 15, 1993, the Plaintiffs, in 87CV867-A *each* obtained a judgment against CNB in the amount of $931,962.50. The trial court also awarded costs and interest at a rate of 8% from March 22, 1985.

CNB appealed the judgments. On August 26, 1993, a hearing was held in 87CV867-A on Defendant's renewed

motion for stay of execution of the judgments. Joseph Vento contended at said hearing that a letter of credit was insufficient as a supersedeas bond. The trial court, finding that Rule 121, Section 1-23(4) of the C.R.C.P authorized a letter of credit ruled that 1) "the Defendant's renewed motion for a stay of execution be and the same hereby is granted upon the Defendant's filing of a letter of credit in the amount of $4,000,000 in the form hereto furnished by the Defendant to the Court." (See Exhibit 3 attached to Plaintiffs request that the Court take judicial notice, filed 2-8-97).

An irrevocable letter of credit dated October 4, 1993 (attached as Exhibit A to Plaintiff's Brief in Support of Plaintiff's Motion for Summary Judgment) was issued by CNB in this matter in lieu of a supersedeas bond.

The Colorado Court of Appeals affirmed the judgments entered in 87CV867-A. The Court [sic] Supreme Court denied CNB's petition for certiorari on December 11, 1995.

On or about December 22, 1995, Linda Saunders filed an action, as personal representative of the estate of Cecilia DeFellippie in the District Court, Pueblo County, Colorado, in which Ms. Saunders alleged that a dispute existed regarding the division of proceeds of the judgments between the Plaintiffs in the 1987 action and Wesley Kettelkamp, who acted as attorney for Plaintiffs in the 1987 action. *See* transcript of hearing of January 3, 1996, in Case No. 95PR2379, attached as Exhibit B to Defendant's Brief in Support of Defendant's Motion for Summary Judgment ("Transcript") at 26:4 to 27:11 (statement by attorney for Ms. Saunders).

Also, CNB received or became aware of letters from the beneficiaries of the Irene C. Coulter and Dominic A. Vento Trusts, as well as from attorneys for Ms. Saunders and Mr. Kettelkamp, all claiming some interest in the proceeds of the judgments. On December 29, 1995, CNB filed an action in the Denver Probate Court, Case No. 95PR2379 (the "Interpleader Action") in response to these competing claims, and in order to satisfy the judgments entered in the 1987 action.

On January 3, 1996, the Denver Probate Court entered an order in the Interpleader Action directing CNB to transfer to an account at Norwest Bank approximately $4.4 million, representing the amount of the judgments against CNB and costs awarded and interest accrued as of January 3, 1996 (the "Interpleader Order"). The Interpleader Order provided that "upon transfer of the judgment amount . . . CNB shall be considered to have satisfied the judgment . . . " See Exhibit C attached to Defendant's Brief in Support of Defendant's Motion for Summary Judgment.

III. PLAINTIFF'S CLAIMS/GROUNDS FOR SUMMARY JUDGMENT

1. Plaintiff claims that the letter of credit is a contract between CNB and the Plaintiff, which CNB breached.

2. Plaintiff further claims that CNB's institution of the Interpleader Action constituted an anticipatory repudiation of the letter of credit.

The "beneficiary" of a letter of credit is defined in C.R.S. Section 4-5-103(1)(d) (1992 Repl. Vol.) as "a person who is entitled under its terms to draw or demand payment."

A review of the letter of credit (Exhibit A, Plaintiff's Motion for Summary Judgment) reveals that the letter of credit was issued to the Pueblo District Court. Accordingly, Pueblo District Court was the beneficiary. Arguably, Plaintiff, along with Cecilia DeFellippie, may be third-party beneficiaries of the letter of credit. However, third-party beneficiaries have no standing to bring an action for wrongful dishonor of a letter of credit. See *Interchemicals Co., Inc. v. Bank of Credit and Commercial International*, 222 A.D. 273; 635 N.Y.S. 2d 194 (1995). The Court, therefore, finds that there was no contract between CNB and Plaintiff.

Assuming arguably that the letter of credit created a contract between CNB and Plaintiff, the Court finds that there has been no breach of said contract. The letter of credit was posted in lieu of a supersedeas bond to guarantee payment of the judgment. CNB satisfied the judgment by paying approximately $4.4 million into the registry of the Denver Probate Court (see Order Interpleader Action).

Finally, in light of the Court's finding above, the Court finds that the Plaintiff's claim that the Interpleader Action constitutes an anticipatory repudiation of the letter of credit is without merit.

IV. DEFENDANT'S GROUNDS FOR SUMMARY JUDGMENT

Defendant claims that the Plaintiff's claims are barred by collateral estoppel and res judicata.

"The doctrines of res judicata and collateral estoppel relieve the parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decision, encourage reliance on adjudication." *City and County of Denver v. Block 173 Associates*, 814 P.2d 824, 830 (Colo. 1991).

"Res judicata operates as a bar to a second action on the same claim as one litigated in a prior proceeding where there is a final judgment, identity of subject matter claims for relief and parties to the action." *Block 173 Associates*, I.D. at 830.

"Collateral estoppel is directed to issue preclusion (citation omitted) when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties whether on the same or a different claim." *Block 173 Associates*, I.D. at 831.

"An issue is actually litigated for purposes of collateral estoppel when the issue has been raised by the parties in the previous action, by the pleadings or otherwise was submitted for determination and determined." *Leahy v. Guaranty National Ins. Co.*, 907 P.2d 697, 699 (Colo. App. 1995).

This court finds that the Order on Interpleader Petition is a "final judgment" as to the issues of whether CNB

has satisfied the judgment and whether CNB's institution of the Interpleader Action constituted an anticipatory repudiation of the letter of credit for purposes of collateral estoppel. Additionally, the Court finds that the Plaintiff is a party in the Interpleader Action, that the Plaintiff has fully litigated the same argument in the Interpleader Action, having made five separate requests to the Denver Probate Court to overturn the Denver Probate Court order on interpleader and having applied to the Colorado Supreme Court for writs of prohibition and mandamus against the Denver Probate Court, which was subsequently denied, and by having unsuccessfully appealed an April 26, 1996, order of the Denver Probate Court which affirmed its January 3, 1996, Interpleader Order. The Court accordingly finds the Plaintiff's claims are barred by collateral estoppel.

IT IS THEREFORE THE ORDER OF THE COURT that summary judgment enter for the Defendant CNB and against the Plaintiff Joseph A. Vento as to Plaintiff's claims.

DONE this 1st day of April 1997.

BY THE COURT:

/s/ Rosalie Vigna
Rosalie Vigna, District Judge

xc: Joseph A. Vento
Kenneth B. Siegel
4-3-97
cc

APPENDIX F

COLORADO COURT OF APPEALS April 23, 1998
No. 97CA0685 **NOT SELECTED FOR PUBLICATION**

Joseph A. Vento,

Plaintiff-Appellant,

v.

Colorado National Bank,

Defendant-Appellee.

Appeal from the District Court of Pueblo County
Honorable Rosalie Vigna, Judge
No. 96CV31

Division I
Opinion by JUDGE METZGER
Davidson and Roy, JJ., concur

JUDGMENT AFFIRMED

Joseph A. Vento, *Pro Se*

Sherman & Howard, L.L.C., Kenneth B. Siegel, Barbara Weil Gall, Denver, Colorado, for Defendant-Appellee

Plaintiff, Joseph A. Vento, appeals the summary judgment entered in favor of defendant, Colorado National Bank. We affirm.

Initially, we note that defendant has questioned plaintiff's standing to bring this action. While defendant may well be correct that a third-party beneficiary such as

plaintiff has no standing to bring an action for wrongful dishonor of a letter of credit, *see Schmidt-Tiago Construction Co. v. City of Colorado Springs*, 633 P.2d 533 (Colo. App. 1981), we elect to address plaintiff's major contention of error.

Plaintiff contends the trial court erred in determining that his claims in this action are barred by collateral estoppel and in entering summary judgment in favor of defendant. We disagree.

Summary judgment is a drastic remedy and should be granted only when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Mancuso v. United Bank*, 818 P.2d 732 (Colo. 1991). It is appropriate to rely on the doctrine of collateral estoppel to award summary judgment. *See Rael v. Taylor*, 832 P. 2d 1011 (Colo. App. 1991), *aff'd in part, rev'd in part*, 876 P.2d 1210 (Colo. 1994).

Collateral estoppel bars relitigation of issues if (1) the issue is identical to an issue actually and necessarily adjudicated at a prior proceeding; (2) the party against whom estoppel is asserted is a party or in privity with a party in the prior proceeding; (3) there was a final judgment on the merits; and (4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding." *City and County of Denver v. Block 173 Associates*, 814 P.2d 824, 831 (Colo. 1991).

Here, the facts are undisputed. Plaintiff's central claim in this litigation is that defendant breached a letter of credit it had tendered as a supersedeas bond securing a $4 million judgment entered in plaintiff's favor. This

judgment, for which plaintiff has since received payment, arose from a breach of fiduciary duty claim brought by plaintiff as a beneficiary of a trust which defendant had administered.

The trial court determined that an order, entered by the Denver Probate Court in an interpleader action brought by defendant, was a final judgment on the same issues raised here, *i.e.*, whether defendant had satisfied the underlying judgment and whether defendant's institution of the interpleader action constituted an anticipatory repudiation of the letter of credit.

The trial court also determined that plaintiff had been a party to the interpleader action and that he had fully litigated the same issues raised here. The trial court specifically noted that plaintiff had made five separate requests, advancing the same arguments as presented here, to the probate court to overturn its interpleader order, had also applied to the supreme court for writs of probation and mandamus against the probate court, and had unsuccessfully appealed the order of the probate court.

Thus, the trial court concluded, plaintiff's claims in the current action were barred by collateral estoppel and it entered summary judgment in favor of defendant.

Having reviewed the record, including that of the Denver Probate Court interpleader action, we conclude the record fully supports the trial court's determinations. Thus, we find no error.

In light of this disposition, we need not address plaintiff's remaining contentions of error.

The judgment is affirmed.

JUDGE DAVIDSON and JUDGE ROY concur.

APPENDIX G

SUPREME COURT, STATE OF COLORADO
CASE NO. 98SC376
CERTIORARI TO THE COLORADO
COURT OF APPEALS, 97CA0685
DISTRICT COURT, PUEBLO COUNTY, 96CV31

ORDER OF COURT

JOSEPH A. VENTO,

Petitioner,
v.

COLORADO NATIONAL BANK,

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, DECEMBER 7, 1998.

[SEAL]

cc:

Joseph A. Vento
102 South Tejon, Suite 1100
Colorado Springs, CO 80903

Kenneth B. Siegel
Barbara Weil Gall
633 Seventeenth St., Suite 3000
Denver, CO 80202

Clerk of District Court
Pueblo County Judicial Building
320 West 10th Street
Pueblo, CO 81003

Honorable Rosalie Vigna
Pueblo County Judicial Building
320 West 10th Street
Pueblo, CO 81003

Patrick H. Stanford, Clerk
Colorado Court of Appeals

APPENDIX H

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COLORADO NATL BANK VS VENTO, JOSEPH A et al

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Opt Party	Tran Mthd	Seq Adr	Amount Due	Amount Paid	Amt To Pay	J/S Disb.
DEF001 JOSEPH A VENTO	SPEC SEQ	1 H	2932855.21	2932855.21	.00	.00
Estate Of Cecilia Defellippie	SPEC SEQ	1 H	919987.78	919987.78	.00	.00
Wesley C. Kettelkamp Jr	SPEC MANL	1 H	745891.34	745891.34	.00	.00
Wesley C. Kettelkamp Jr	SPEC MANL	1 H	55093.17	55093.17	.00	.00
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[SEAL]

APPENDIX I

United States Code, Title 42, Sec. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX J

Federal Rules of Evidence, Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

APPENDIX K

Federal Rules of Evidence, Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

* * *

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness

* * *

APPENDIX L

Colorado Revised Statutes § 13-9-103. Jurisdiction

(1) The probate court of the city and county of Denver has original and exclusive jurisdiction in said city and county of:

(a) The administration, settlement, and distribution of estates of decedents, wards, and absentees;

(b) Property vested in any person under a legal disability but paid to or held by another for such person's use or benefit as authorized by court order or as authorized by a power contained in a will or trust instrument;

(c) Property vested in any minor pursuant to the "Colorado Uniform Transfers to Minors Act", or any predecessor act thereto, or any act having a substantially similar legal effect;

(d) The probate of wills;

(e) The granting of letters testamentary, of administration, of guardianship, and of conservatorship;

(f) The administration of guardianships of minors and of mentally competent persons and of conservatorships of mentally ill or mentally deficient persons and of absentees;

(g) Proceedings under article 23 of title 17 and articles 10 to 15 of title 27, C.R.S.;

(h) The determination of heirship in probate proceedings and the devolution of title to property in probate proceedings;

(i) Actions on the official bonds of fiduciaries appointed by it;

(j) The construction of wills;

(k) The administration of testamentary trusts, except as provided in subsection (2) of this section; and

(l) All other probate matters.

(2) If a testamentary trust is established by the will of the decedent and if it appears that it was not the intention of the testator that the court should continue the administration of the estate after the payment in full of all debts and legacies except the trust property, the court shall proceed to final settlement of such estate as in other cases, order the trust fund or property to be turned over to the trustee as such, and shall not require the filing of inventories and accounts, or supervise the administration of the trust; except that any party in interest of such trust, including the trustee thereof, may invoke the jurisdiction of the probate court with respect to any matters pertaining to the administration or distribution of such trust or to construe the will under which it was established.

(3) The court has jurisdiction to determine every legal and equitable question arising in connection with decedents', wards', and absentees' estates, so far as the question concerns any person who is before the court by reason of any asserted right in any of the property of the estate or by reason of any asserted obligation to the estate, including, without limiting the generality of the foregoing, the jurisdiction:

(a) To give full and complete legal and equitable relief in any case in which it is alleged that the decedent breached an agreement to make or not to make a will;

(b) In any case in which a district court could grant such relief in a separate action brought therein, to impose or raise a trust with respect to any of the property of the decedent or any property in the name of the decedent, individually or in any other capacity, in any case in which the demand for such relief arises in connection with the administration of the estate of a decedent;

(c) To partition any of the real or personal property of any estate in connection with the settlement thereof.

(4) Nothing in this article shall prevent any district court sitting in law or equity from construing a will which is not before the probate court or from determining questions arising in connection with trusts which are not under the jurisdiction of the probate court.

(5) The court has jurisdiction to determine every legal and equitable question arising out of or in connection with express trusts.

(6) The provisions of articles 10 to 20 of title 15, article 23 of title 17, and articles 10 to 15 of title 27, C.R.S., shall govern the issuance and service and proof of service of any process, notice, citation, writ, or order of court and shall govern all other proceedings had pursuant to the powers of the court recited in subsections (1) and (2) of this section. The Colorado rules of civil procedure shall govern such matters when the proceedings are had pursuant to the powers granted to the court under any of the other provisions of this section.

(7) With respect to any trust established by or for an individual with his or her assets, income, or property of any kind, notwithstanding any statutory provision to the contrary, the court shall not authorize, direct, or ratify any trust that either has the effect of qualifying or purports to qualify the trust beneficiary for federal supplemental security income, or public or medical assistance pursuant to title 26, C.R.S., unless the trust meets the criteria set forth in sections 15-14-409.6 to 15-14-409.9, C.R.S., and any rule adopted by the medical services board pursuant to section 26-4-506.6, C.R.S.

APPENDIX M

Colorado Rules of Civil Procedure, Rule 1. Scope of Rules

(a) Procedure Governed. These rules govern the procedure in the supreme court, court of appeals, district court and superior courts and in the juvenile and probate courts of the City and County of Denver, in all actions, suits and proceedings of a civil nature, whether cognizable as cases at law or in equity, and in all special statutory proceedings, with the exceptions stated in Rule 81. They shall be liberally construed to secure the just, speedy, and inexpensive determination of every action. Rules of civil procedure governing county courts shall be in accordance with Chapter 25 of this volume. Rules of Procedure governing probate courts and probate proceedings in the district courts shall be in accordance with these rules and Chapter 27 of this volume. (In case of conflict between rules, those set forth in Chapter 27 shall control.) Rules of Procedure governing juvenile courts and juvenile proceedings in the district courts shall be in accordance with these rules and Chapter 28 made effective on the same date as these rules. In case of conflict between rules those set forth in Chapter 28 shall control. Rules of Procedure in Municipal Courts are in Chapter 30.

(b) Effective Date. These rules will take effect on April 1, 1970, and thereafter all laws in conflict therewith shall be of no further force or effect. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect

would not be feasible or would work injustice, in which event the former procedure applies.

(c) How Known and Cited. These rules shall be known and cited as the Colorado Rules of Civil Procedure, or C.R.C.P.

Colorado Rules of Civil Procedure, Rule 22. Interpleader

(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross claim or counterclaim. The provisions of this Rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(2) In any civil action of interpleader, a district court may enter its order restraining all claimants from instituting or prosecuting any proceeding in any court of this state affecting the property, instrument, or obligation involved in the interpleader action until further order of the court. Such district court shall hear and determine the

case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment.

Colorado Rules of Civil Procedure, Rule 82. Jurisdiction Unaffected

These rules shall not be construed to extend or limit the jurisdiction of any court.

APPENDIX N

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 97-S-463

JOSEPH A. VENTO

Plaintiff,

vs.

COLORADO NATIONAL BANK, C. JEAN STEWART, DAVID W. STARK, and JACK M. MERRITTS,

Defendants.

AFFIDAVIT OF DAVID W. STARK

David W. Stark, being first duly sworn, states as follows:

1. I am an attorney licensed to practice law in Colorado. I represent and have represented Colorado National Bank ("CNB") in connection with various legal actions involving Joseph A. Vento since 1987, and as such, have personal knowledge of the matters contained in this affidavit.

2. In 1968, the Joseph A. Vento Trust, the Dominic A. Vento Trust, the Irene C. Coulter Trust and the Cecilia DeFellippie Trust became co-owners of an undivided one-quarter interest in coal mining property in Fremont County, Colorado. CNB and its predecessors (the First National Bank of Pueblo, which became Colorado National Bank-Pueblo, which became CNB) acted as the sole Trustee of each of the four trusts which owned the coal mining property.

3. On or about September 8, 1987, Joseph A. Vento and Cecilia DeFellippie filed an action against CNB's predecessor asserting breach of fiduciary duty in managing and administering their trusts and the Trust property (the "1987 Action"). On June 15, 1993, the plaintiffs in the 1987 Action each obtained a judgment against CNB in the amount of $931,962.50 (the "Judgments"). The trial court also awarded costs and interest at a rate of 8% from March 22, 1985. The amount of the Judgments, including pre- and post-judgment interest, was approximately $4,347,307.48 as of January 3, 1996. CNB unsuccessfully appealed the Judgments. The Colorado Supreme Court denied CNB's petition for certiorari on December 11, 1995.

4. In June 1994, the beneficiaries of the Irene C. Coulter Trust and the Dominic A. Vento Trust sued CNB and Joseph A. Vento in the Denver District Court, alleging among other claims breach of fiduciary duty and negligence, because they were not included in or advised of the 1987 Action. These beneficiaries also filed an action against me, my law firm, and other attorneys who worked on the 1987 Action, based on the same allegations. CNB settled with the plaintiffs in that case, and Joseph A. Vento prevailed on the claims against him following a jury trial in April 1996.

5. On or about December 22, 1995, Linda Saunders filed an action, as Personal Representative of the Estate of Cecilia DeFellippie in the District Court, Pueblo County, Colorado in which Ms. Saunders alleges that a dispute exists regarding the division of proceeds of the Judgments between the plaintiffs in the 1987 Action and Wesley Kettelkamp, who acted as attorney for plaintiffs

in the 1987 Action. Mr. Kettelkamp claims entitlement to a portion of the proceeds of the Judgments for payment of legal services he rendered to Plaintiff and Cecilia DeFellippie in the 1987 Action.

6. Following the denial of CNB's petition for certiorari, CNB received or became aware of letters from the beneficiaries of the Irene C. Coulter and Dominic A. Vento Trusts, as well as from attorneys for Ms. Saunders and Mr. Kettelkamp, all claiming some interest in the proceeds of the Judgments. On December 29, 1995, CNB filed an action in the Denver Probate Court, Case No. 95 PR 2379 (the "Interpleader Action") in response to these competing claims, and in order to satisfy the Judgments entered in the 1987 Action.

7. On January 3, 1996, the Denver Probate Court entered an order in the Interpleader Action directing CNB to transfer to an account at Norwest Bank approximately $4.4 million, representing the amount of the Judgments against CNB, plus costs awarded and interest accrued as of January 3, 1996. The order provided that "upon transfer of the Judgment amount . . . CNB shall be considered to have satisfied the Judgment . . . " A certified copy of this order is attached to Defendants Colorado National Bank and David W. Stark's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment ("Motion") as *Exhibit B*. Prior to January 3, 1996, 1 provided Mr. Vento and his counsel, Mr. Barber with copies of the Complaint and Motion in the Interpleader Action. I asked Mr. Vento if he would accept service of the complaint in the Interpleader Action, but he did not agree to do so.

8. Mr. Vento has made six separate requests to the Denver Probate Court itself in the Interpleader Action to overturn the Denver Probate Court's January 3 ruling:

a. Motion to Change Venue, filed January 8, 1996, denied April 26, 1996;

b. Motion to Vacate, filed January 8, 1996, denied April 26, 1996;

c. Renewed Motion to Change Venue, filed January 25, 1996, denied April 26, 1996;

d. Motion for Relief from January 3 Order on Interpleader, filed February 8, 1996, denied April 26, 1996; and

e. Objection By Defendant Joseph A. Vento to CNB Being Discharged From All Further Liability and Dismissed From This Case; Affirmatively for a Motion for an Order to Dismiss this Case, or Alternatively for an Order Vacating or Dissolving the Preliminary or Temporary Injunction, filed October 18, 1996, and denied December 13, 1996; and

f. Amended Answer of Joseph A. Vento (alleging lack of due process as an affirmative defense) filed September 25, 1996.

A certified copy of the Register of Actions in the Interpleader Action is attached to the Motion as *Exhibit C*.

9. In response to the Denver Probate Court's January 3 order, Mr. Vento applied to the Colorado Supreme Court for Writs of Prohibition and Mandamus against the Denver Probate Court on June 20, 1996, and the petition was denied on June 27, 1996. Mr. Vento also appealed the April 26, 1996 order of the Denver Probate Court, which affirmed its January 3, 1996 Order, to the Colorado Court

of Appeals on July 26, 1996, and the appeal was dismissed, with prejudice, on August 9, 1996.

10. On April 26, 1996, The Honorable Patti F. O'Rourke denied Vento's request that she hold CNB in contempt in the 1987 Action for CNB's alleged failure to pay the Judgments, and ruled that the jurisdiction of the Denver Probate Court was a question that only the Denver Probate Court could decide. A certified copy of Judge O'Rourke's Order on Citation for Contempt is attached to the Motion as *Exhibit D.*

11. The Honorable Rosalie Vigna granted summary judgment in the Pueblo Action on April 1, 1997, ruling that CNB satisfied the Judgments in the Interpleader Action, and that Vento's claims were barred by collateral estoppel. A certified copy of Judge Vigna's Summary Judgment Order is attached to the Motion as *Exhibit E.*

12. Vento has now moved to disqualify or recuse Judge Rice from the Interpleader Action, less than twenty days prior to the April 28, 1997 trial date. A copy of Vento's Motion to Disqualify, or Alternatively, for Recusal, is attached to the Motion as *Exhibit F.*

/s/ David W. Stark
David W. Stark

STATE OF COLORADO)
) SS.
COUNTY OF DENVER)

I hereby certify that the foregoing Affidavit was subscribed and sworn to before me on this 21st day of April, 1997.

WITNESS my official hand and seal.

My commission expires: 9-27-98.

/s/ Diana Frogge
Notary Public

[SEAL]

APPENDIX O

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOSEPH A. VENTO, Plaintiff-Appellant, v. COLORADO NATIONAL BANK; C. JEAN STEWART; DAVID W. STARK; JACK M. MERRITTS, Defendants-Appellees.	)	No. 98-1236

OPENING BRIEF OF PLAINTIFF-APPELLANT JOSEPH A. VENTO

Appeal From The United States District Court For The District Of Colorado, Case No. 97-S-463

/s/ _____
Joseph A. Vento, #637
Pro se
102 S. Tejon, Suite 1100
Colorado Springs, CO 80903
(719) 578-3329

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The District Court had subject matter jurisdiction pursuant to 42 U.S.C. §1983 and 42 U.S.C. §1988. The judgment appealed from is a final order. This Court has jurisdiction pursuant to 28 U.S.C. §1291. The Order of June 4, 1998, by the District Court was entered on June 8, 1998. The Notice of Appeal was filed on June 22, 1998, which renders it timely under Rule 4(b) of Fed. R. App. P.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Whether The United States District Court For The District Of Colorado Erred In Granting The Motion To Dismiss Of Each Of The Appellees, Colorado National Bank, C. Jean Stewart, David W. Stark and Jack M. Merritts?

(2) Whether The District Court Erred In Finding That Appellee C. Jean Stewart As The Denver Probate Judge Had Jurisdiction Over The Interpleader Action Hearing On January 3, 1966, In The Denver Probate Court In Case No. 95 PR 2379?

(3) Whether The District Court Erred In Granting The Motions To Dismiss Without Considering That The Appellees Acted To Deprive The Appellant Joseph A. Vento Of His Property Without Due Process Of Law In The Interpleader Action In The Denver Probate Court In Case No. 95 PR 2379?

STATEMENT OF THE CASE

(1) The Nature of the Case

This is a civil rights case pursuant to 42 U.S.C. §1983.

(2) The Course of Proceedings and Disposition In the Court Below

On March 7, 1997, Joseph A. Vento (Vento) as plaintiff filed an action under 42 U.S.C. §1983 against Colorado National Bank (CNB), C. Jean Stewart (Judge Stewart), David W. Stark, an attorney (Stark), and Jack M. Merritts, an attorney (Merritts) in the United States District Court for the District of Colorado, Civil Action No. 97-S-463.

On April 1, 1997, Merritts filed a motion to dismiss for failure to state a claim for which relief can be granted pursuant to Rule 12(b)(6) of Fed. R. Civ. P.

On April 22, 1997, CNB and Stark filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), or in the alternative, motion for summary judgment pursuant to Fed. R. Civ. P. 56.

On June 17, 1997, Judge Stewart filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of Fed. R. Civ. P.

On July 21, 1997, the District Court ordered that the Court's July 9, 1997, Order of Reference to Magistrate Judge Bruce D. Pringle shall include the foregoing motions to dismiss.

On April 28, 1998, the Recommendation of United States Magistrate Judge Bruce D. Pringle was filed. He recommended that all three of the foregoing motions to

dismiss be granted; that the case be dismissed with prejudice; and that the motions for attorney fees and expenses under Fed. R. Civ. P. 11 be granted to CNB and Stark; and that the motion for attorney fees by Merritts under 42 U.S.C. §1988 be granted.

On June 4, 1998, United States District Judge Daniel B. Spaar agreed with the Recommendation of Magistrate Judge Bruce D. Pringle in its entirety and Ordered:

1. Defendant Jack M. Merritts' Motion to Dismiss (filed April 1, 1997) is GRANTED.

2. Defendants Colorado National Bank's and David W. Stark's Motion to Dismiss (filed April 22, 1997) is GRANTED.

3. Defendant C. Jean Stewart's Motion to Dismiss (filed June 17, 1997) is GRANTED.

4. Defendants Colorado National Bank's and David W. Stark's Motion for Injunction Prohibiting Joseph Vento from Filing Additional Complaints Against David W. Stark, Colorado National Bank, or Any of Their Agents or Attorneys Without Leave of Court (filed April 22, 1997) is DENIED.

5. Defendant C. Jean Stewart's Motion to Stay Discovery (filed June 17, 1997) is DENIED as moot.

6. Defendants Colorado National Bank's and David W. Stark's Motion for Sanctions Under Fed. R. Civ. P. 11 (filed April 29, 1997) is GRANTED. This matter is hereby referred back to the Magistrate Judge for determination of the amount of reasonable attorney fees and expenses to be awarded.

7. Defendant Jack M. Merritts' request for costs, including reasonable attorney fees pursuant to 42 U.S.C. §1988 (made April 1, 1997) is GRANTED. This matter is hereby referred back to the Magistrate Judge for determination of the amount of reasonable attorney fees and expenses to be awarded.

8. Defendant Stewart's request for costs and attorney fees (made June 17, 1997) is DENIED.

9. Plaintiff Vento's request for attorney fees for responding to the Motion for Injunction (made May 21, 1997) is DENIED.

10. This civil action is dismissed with prejudice.

On June 22, 1998, Vento filed a Notice of Appeal to the United States Court of Appeals for the Tenth Circuit.

(3) Statement of the Facts

On September 3, 1987, Vento and his sister, Cecilia De Fellippie (she died on December 1, 1995), filed an action in the Pueblo County District Court, Civil Action No. 87 CV 867, against Colorado National Bank-Pueblo (CNB-Pueblo) for breach of fiduciary duty. After a long span including two trials, on June 15, 1993, District Court Judge Patti F. O'Rourke entered judgment in favor of Vento and his sister individually and against CNB-Pueblo in its corporate capacity. In that Order of Judgment Vento was granted a judgment for damages to certain seams of coal property held in trust in accordance with his proportionate interest. Later, the judgment was amended to include prejudgment interest from March 22, 1985. His sister was granted the same judgment.

CNB-Pueblo initiated an appeal to the Colorado Court of Appeals and in order to obtain a stay of execution during the appeal moved for an order staying execution of the District Court's judgment entered on June 15, 1993, stating its intention to file a letter of credit as a supersedeas bond. Vento and his sister objected to the filing of a letter of credit as a supersedeas bond instead of filing a supersedeas bond. A hearing was held on September 16, 1993, before Judge O'Rourke, and on September 24, 1993, she granted CNB-Pueblo's motion for stay of execution upon Colorado National Bank (CNB) as the parent of CNB-Pueblo filing its own (CNB) letter of credit in the form submitted by CNB.

CNB-Pueblo, by this time having merged into CNB, appealed the judgments to the Colorado Court of Appeals where they were affirmed. Thereafter on December 11, 1995, the Colorado Supreme Court denied CNB-Pueblo's petition for writ of certiorari. Then the Colorado Court of Appeals issued its mandate to the Pueblo County District Court on January 5, 1996.

On December 21, 1995, the defendant Jack M. Merritts (Merritts) wrote a letter (Appendix, page 94) to Thomas J. Bissell, Assistant General Counsel for CNB, objecting to any distribution of funds by CNB to Vento because of the unsuccessful appeal by CNB of the judgment in the 1987 Action. In that letter Merritts demands that CNB immediately take all appropriate action including seeking an order of the appropriate court to deposit the funds that would otherwise be paid to Vento (under the judgment of June 15, 1993, in the Pueblo County District Court) in an account with a national bank in Denver. The letter ends with the statement that, "Mr.

Siegel requested that I address this letter directly to you." Mr. Siegel is Kenneth B. Siegel, one of the attorneys for the defendants CNB and Stark in this action.

On December 29, 1995, CNB filed a Complaint for Interpleader and Injunctive Relief in the Denver Probate Court, Case No. 95 PR 2379, with respect to the judgments of the Pueblo County District Court of June 15, 1993, or the proceeds therefrom. The caption of the case in the Denver Probate Court was: *Colorado National Bank, Plaintiff, v. Joseph A. Vento, Linda Saunders, Personal Representative of the Estate of Cecilia De Fellippie, Irene C. Coulter, Richard G. Vento. Angelina Vento, Marihelen Vento and Wesley C. Kettelkamp, Jr.*

The interpleader action was based on the following three matters: (1) a claim of Vento's attorney, W.C. Kettelkamp, Jr., to some portion of the judgments; (2) a pending action by the Estate of Cecilia De Fellippie, in the Pueblo County District Court; and (3) the letter of Merritts dated December 21, 1995, mentioned above and set forth in paragraph 14 of the Complaint. Then in the prayer of the Complaint CNB asks that the Denver Probate Court satisfy judgments of the Pueblo County District Court.

The Denver Probate Court only has one judge who at that time was Judge Stewart. The record shows a prior relationship between CNB and Judge Stewart (Appendix, page 93). Without disclosing that in Case No. 95 PR 2379 as she had in a recent companion case, and a motion for disqualification filed, she recused herself but without first rescinding the Order on Interpleader Petition (Appendix, page 26) she issued on January 3, 1996.

Under Rule 22 of the Colorado Rules of Civil Procedure, the interpleader rule, CNB joined the aforesaid seven defendants in the action and then the Denver Probate Court required them to interplead. This included Vento. On January 5, 1996, the Colorado Court of Appeals in Case No. 93 CA 1375 issued its mandate ordering the judgment is affirmed in Case No. 87 CV 867 in the Pueblo County District Court. All that remained to occur in the Pueblo County District Court was for the judgments to be paid. Instead of paying off the judgments to Vento and his sister and ending the litigation, CNB chose to interplead the amounts of the Pueblo County District Court judgments in the Denver Probate Court in Case No. 95 PR 2379. Of the seven parties joined as defendants by CNB only two were judgment creditors, Vento and his sister's estate. The other five parties were joined as defendants because CNB alleged that each of them asserted claims against the judgments or the proceeds therefrom, although none of them were judgment creditors with respect to the Pueblo County District Court judgments. Rule 22 of the Colorado Rules of Civil Procedure provides that, "persons having claims against the plaintiff (CNB) may be joined as defendants. . . . That Rule 22 states nothing about joining persons alleging claims against a judgment on the proceeds therefrom.

After CNB's interpleader complaint was filed on December 29, 1995, in the Denver Probate Court, a hearing was set on January 3, 1996. On that same day after a non-evidentiary hearing that lasted for about one and on-[sic] half hours, Judge Stewart, the Denver Probate Court Judge, entered an Order on Interpleader Petition (Appendix, page 26). Notice to Vento of that hearing at 10:30 a.m.

on January 3, 1996, was given to him by serving him with process and notice of the hearing on January 3, 1996, at his home in Pueblo, Colorado, which is more than 100 miles from Denver, at 7:45 a.m. on January 3, 1996, the same day as the hearing.

On or about 9:15 a.m. on January 3, 1996, Vento called the law firm of Dufford & Brown, P.C. in Denver and asked them to appear at that 10:30 a.m. hearing on January 3, 1996, on his behalf. Upon appearing for Vento at that hearing, the said law firm through Phillip D. Barber requested a continuance, which request was abruptly denied (Appendix, pages 35-36).

In that Order on Interpleader Petition (Appendix, page 26) on January 3, 1996, the Denver Probate Court purported to satisfy the judgment obtained against CNB-Pueblo on June 15, 1993, in Civil Action No. 87 CV 867 without any payments being made to the judgment creditors and before the Mandate issued out of the Colorado Court of Appeals on January 5, 1996, affirming the judgment granted in the 1987 action in the Pueblo County District Court. All of this was done by CNB simply depositing the judgment amounts with the Denver Probate Court in the interpleader action in Case No. 95 PR 2379. The seven defendants were then ordered to interplead and file claims for the interpleaded funds. Even though his judgment had been affirmed by the appellate courts of Colorado, Vento had to once again compete for the interpleaded funds with six other defendants.

SUMMARY OF ARGUMENT

Vento respectfully submits that the District Court's Order of June 4, 1998 (Appendix, page 115), granting the Motions to Dismiss of Defendant Jack M. Merritts, Defendants Colorado National Bank and David W. Stark, and Defendant C. Jean Stewart is erroneous and should be reversed for the following reasons and each of them:

1. The District Court erroneously dismissed Vento's Complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of Fed. R. Civ. P. The Complaint together with Exhibits A through H attached to and made a part thereof adequately pleads facts to state a claim for relief against the defendants. There is alleged in Count I of the Complaint (Appendix, page 10) a claim for relief against the defendants based upon the private defendants being jointly engaged and acting together with Judge Stewart and willfully participating in joint activity with Judge Stewart. Alternately, there is alleged in Count II of the Complaint (Appendix, page 22) a claim for relief based upon the defendants being involved in a conspiracy.

2. The District Court held that Judge Stewart had jurisdiction over the interpleader suit because, "Plaintiff (Vento) fails to understand that the interpleader action was brought in the Denver Probate Court because the money owed as a result of the Pueblo District Court judgment belonged to an express trust." (Appendix, page 116.) The District Court was erroneous. The judgments belonged to individuals, Joseph A. Vento and his sister, Cecilia De Fellippie. Furthermore, Judge Stewart acted with a complete absence of jurisdiction because, among

other reasons, neither the Colorado Constitution nor Colorado laws gave the Denver Probate Court jurisdiction over the interpleader action, Case No. 95 PR 2379.

3. The District Court held that the private party defendants, CNB, Stark and Merritts did not act under color of state law for purposes of §1983. The District Court erred because they jointly engaged with, acted together with, and willfully participated with Judge Stewart in initiating the interpleader action, Case No. 95 PR 2379 in the Denver Probate Court and causing the Order on Interpleader Petition to issue on January 3, 196 [sic], causing harm and injury to Vento (Appendix, pages 19-22; paragraphs 23-26 of the Complaint). Also, it is alleged that the three private party defendants were involved in a conspiracy with Judge Stewart (Appendix, pages 11-14; paragraphs 25 and 27-30 of the Complaint).

4. The District Court erred in not considering that Vento has a claim for relief under §1983 because he was deprived of property through state action without substantive due process of law and procedural due process of law. The law of substantive due process is intended to secure the individual from the arbitrary exercise of the powers of government and bars certain arbitrary and wrongful actions. The fundamental requirement of procedural due process is the opportunity to be heard at a meaningful time and in a meaningful manner before impartial tribunal. Vento was not accorded substantive or procedural due process and Judge Stewart was not impartial.

ARGUMENT AND AUTHORITIES

The Standard Of Review

The standard of review for a District Court's dismissal of a complaint pursuant to Rule 12(b)(6) of Fed. R. Civ. P. for failure to state a claim for relief for which relief could be granted is reviewed *de novo. Jacobs, Visconsi & Jacobs v. City of Lawrence,* 927 F. 2d 1111 (10th Cir. 1991). A dismissal for failure to state a claim upon which relief may be granted cannot be upheld "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson,* 355 US 41, 45-46, 78 S Ct. 99, 101-102, 2 L.Ed 2d 80 (1957). In reviewing such a dismissal, the appellate court must examine only the pleadings, accept the factual averments as true and view them in a light most favorable to the plaintiff. *Monument Builders v. American Cemetery Assn,* 891 F.2d 1473, 1476 (10th Cir. 1989).

1. The United States District Court For The District Of Colorado Erred In Granting The Motions To Dismiss Of The Defendant Colorado National Bank, Defendant C. Jean Steward, Defendant David W. Stark, And Defendant Jack M. Merritts.

A motion to dismiss brought pursuant to Rule 12(b)(6) of Fed. R. Civ. P. for failure to state a claim upon which relief can be granted requires the court to determine whether the plaintiff has pleaded cognizable claims. The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a short

and plain statement of the claim that will give the defendant fair notice of what the plaintiffs claim is and the grounds upon which it rests. *Conley v. Gibson*, 355 US 41, 78 S Ct 99, 2 L.Ed 2d 80, 85 (1957). In all respects the normal federal rule pleading standards apply to civil rights actions. *Bounds v. Smith*, 430 US 817, 917 S Ct 1491, 52 L.Ed 2d 72 (1977); Wright, Miller & Kane, *Federal Practice and Procedure, Civil 2d: §1230.*

To survive a motion to dismiss, a pleading that raises a section 1983 claim must allege that the Plaintiff, Joseph A. Vento (Vento) has a cause of action under 42 U.S.C. §1983 if he was deprived of property through state action without due process of law. *Coleman v. Turpen*, 697 F.2d 1341, 1343 (10th Cir. 1983) citing *Lugar v. Edmondson Oil Co.*, 457 US 992 (1982). The plaintiff Complaint adequately does that.

Two primary issues in a §1983 action are: (1) whether the defendants violated the plaintiff's constitutional rights, and (2) whether such violation was under color of state law. *Dykes v. Hosemann*, 743 F.2d 1488 (1984).

In filing a motion to dismiss for failure to state a claim under Rule 12(b)(6) of Fed. R. Civ. P., the material allegations of the complaint must be accepted as true. *Walker Process Equipment, Inc. v. Food Machinery Chemical Corp.*, 382 US 172, 174-75 (1965). The only facts to consider are the facts in the complaint. The District Court and Magistrate Judge erred in considering the following facts which were not alleged in the Complaint:

(1) After numerous unsuccessful attempts in the Denver Probate Court, the Pueblo District Court, the Colorado Court of Appeals and the Colorado Supreme

Court to either overturn the interpleader order or obtain relief from its adverse effects. . . . (Page 3 of the Judge Magistrate's Recommendation) (Appendix, page 104). There were no documents or contents to show or explain the unsuccessful attempts indicating that this was spin lifted from the defendants' motions and briefs.

(2) This expansively worded provision invests the probate court with at least colorable jurisdiction over competing claims of several express trusts to a particular asset or fund. (Page 5 of the Judge Magistrate's Recommendation) (Appendix, page 106).

(3) "Plaintiff fails to understand that the interpleader action was brought the Denver Probate Court because "the money owed as a result of the Pueblo District Court judgment belonged to an express trust." (Page 2 of the District Court Order of June 4, 1998) (Appendix, page 116). The money owed as a result of the Pueblo County District Court belonged to Joseph A. Vento and his sister, Cecilia De Fellippie, individually, because the judgment was granted to them individually.

(4) "Because Defendant Stewart did not act in the clear absence of all jurisdiction, she is entitled to absolute immunity from Plaintiff's claims based on her rulings and orders in the interpleader action before the Denver Probate Court." (Page 2 of the District Court Order of June 4, 1998) (Appendix, page 116)

(5) "Plaintiff objects to the Magistrate Judge's statement of the facts. Upon review, the court is satisfied that the Magistrate Judge did not materially misstate Plaintiff's factual allegations and that the Magistrate Judge applied the appropriate standard of review for a motion

to dismiss." (Page 3 of the District Court Order of June 4, 1998) (Appendix, page 117). The only facts the District Court should consider are those pleaded in the Complaint.

(6) "This Complaint appears be nothing more than an attempt to relitigate issues already litigated in the state courts." (Page 3 of the District Court Order of June 4, 1998) (Appendix, page 117).

Vento presented three counts in his Complaint. Count I alleges a separate claim for relief in which private individuals and a private entity engage with and act jointly with state officials in the challenged action (Appendix, page 10). Count II alleges a separate claim for relief for conspiracy (Appendix, page 22). Count III seeks punitive or exemplary damages (Appendix, page 23).

The District Court did not focus on alternate theories of recovery and the inability to state claim under one approach does not preclude consideration of a second approach. *Crabtree v. Muchmore*, 904 F.2d 1475, 1480 (10th Cir. 1990).

The Complaint alternately alleges three different ways that the private defendants (CNB, Stark and Merritts) were acting under color of law:

(1) Jointly engaged with, acting jointly, and/or acting together with Judge Stewart. See paragraphs 23, 24 and 25 of the Complaint (Appendix, pages 19-21).

(2) Willful participant in joint activity with Judge Stewart. See paragraphs 15, 16, 17, 19, 23, 24 and 25 of the Complaint (Appendix, pages 15 and 19-21).

(3) Involvement in a conspiracy with Judge Stewart. See paragraphs 25 and 27 through 30 of the Complaint (Appendix, pages 20-23).

Acting Under Color Of Law By Joint Engagement – Count I

It is well established that private individuals can be held liable under §1983. In order to hold a private individual liable under §1983 it must be shown that the private person, (a) was jointly engaged with state officials in the challenged action, or (b) has received significant aid from state officials, or (c) that the private individual's conduct is in some way chargeable to the state. *Lee v. Town of Estes Park, Colo.*, 820 F. 2d 1112, 1114 (10th Cir. 1987).

Where a plaintiff alleges that the attorney "joined or cooperated with" or conspired with state officials who acted under color of state law, state action will exist. *Ament v. Commonwealth Nat. Bank*, 404 F. Supp 911, 914 n:6 ((1981). In *Adickes v. S. H. Kress & Co.*, 398 US 144, 90 S Ct 1598, 26 L.Ed.2d 142 (1970) the Supreme Court reaffirmed the rule that "private persons jointly engaged with state officials in the prohibited action are acting "under color of law" for purposes of §1983. See also, *Norton v. Liddell*, 620 F.2d 1375, 1378 (10th Cir. 1980). A private person acting jointly with state officials in the prohibited action acts under color of low [sic]. *United States v. Price*, 380 US 784, 86 S Ct 1152, 16 L.Ed 2d 267 (1966).

To act under color of state law for §1983 purposes does not require that the defendant be an officer of the state. It is enough that he is a willful participant in joint

action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting "under color" of law for purposes of § 1983 actions. *Dennis v. Sparks*, 449 US 24, 101 S Ct 183, 66 L.Ed 2d 185, 189 (1980).

There is no bright line by which the conduct of private parties become state action for purposes of the Fourteenth Amendment and civil rights statutes. *Voytko v. Ramada Inn of Atlantic City*, 445 F.Supp. 315, 321 (1978).

In this case unlike *Lugar v. Edmondson Oil Co.*, 452 US 992 (1982) and similar cases, there was no seizure of the property in a physical manner or by the act of an officer of the State taking custody. What we have here is the private parties putting the property into the custody of the law in an interpleader suit and taking it away from and removing it form [sic] the reach of the plaintiff Vento through his judgment and interfering with his rights to execute on the judgment or have his judgment satisfied.

In *Lugar v. Edmondson Oil Co.*, 457 US 992, 102 S Ct 2744, 73 L. Ed 2d 482 (1982), the conduct allegedly causing the deprivation of a federal right to be fairly attributed to the State was reflected in a two part approach: First, the deprivation must be caused (a) by the exercise of some right or privilege created by the State (in the case at hand C.R.C.P. 22 – Interpleader) or (b) by a person for whom the State is responsible, in the case at hand, Judge Stewart, and second, the party charged with the deprivation be one who fairly may be said to be a state actor. There is no doubt that Judge Stewart is a state actor because she is a state official. Defendants CNB, Stark and Merritts are state actors because they acted together with

and were jointly engaged with Judge Stewart and with each other in causing the deprivation. In *Lugar,* the Supreme Court explained that a private party's joint participation with State officials in the seizure of disputed property is sufficient to characterize that party as a "state actor" for purposes of the Fourteenth Amendment and that, "A private party invoking state prejudgment attachment procedure acts under color of law," and that "The private use of challenged state procedures with the help of state officials constitutes state action for purposes of the Fourteenth Amendment."

A seizure of property occurs when there is some meaningful interference with an individual's possessory interest in that property. *Auster Oil & Gas, Inc. v. Stream,* 764 F.2d 381, 388 (1985). In the case at hand these defendants interfered with Vento's interest in his property by bringing the interpleader action. When private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found. *Tulsa Professional Collection Services v. Pape,* 485 US 478, 486, 108 S Ct 1340, 1345, 99 L.Ed 2d 565 (1988).

If the misuse of the legal procedure is so egregious as to subject the aggrieved individual to a deprivation of constitutional dimensions and the tort feasor is acting under color of state law, §1983 may be employed. *Norton v. Liddell,* 620 F.2d 1375, 1378 (10th Cir. 1980).

Acting Under Color of Law With A Conspiracy – Count II

The defendants in challenging the sufficiency of Vento's complaint argued that he had failed to state a

claim under §1983 since he had failed to allege adequately a conspiracy among the defendants. The involvement of a state judge in a conspiracy plainly provides the state action essential to show a violation of a plaintiffs Fourteenth Amendment rights. *Sparkman v. McFarlin,* 601 F.2d 261, 263 (1979). A private party involved in such a conspiracy, even though not an official of the state, can be liable under §1983. *Sparkman, supra* at page 264. Private attorneys alleged to have conspired with state officials may be held liable under §1983. *Richardson v. Fleming,* 651 F.2d 366, 368 (1981).

Conspiracies are ordinarily clandestine. A fact finder could reasonably conclude on the basis of Vento's allegations, "not only that CNB, Stark and Merritts used the state court proceedings (the Denver Probate Court) to produce a constitutional wrong, but that there was agreement between them and Judge Stewart beyond ordinary request and persuasion by CNB, and that Judge Stewart invidiously used her office to deprive Vento of a federally protected right. *Brucar v. Ruben,* 638 F.2d 987, 993 (1980).

The following overt acts indicate that a conspiracy existed between Judge Stewart, CNB, Stark and Merritts:

(1) Under the circumstances then prevailing, Vento was not given a continuance on January 3, 1996 (Appendix, pages 35-36).

(2) Vento was not given any time to file an answer or otherwise respond to the complaint (Appendix, page 13; paragraph 11 of the Complaint).

(3) On page 15 of the transcript of the hearing on January 3, 1996, in the Denver Probate Court attached as

Exhibit B to the Complaint before defendant Stark as attorney for CNB finished his presentation, Judge Steward [sic] said, "Mr. Stark, I don't think there is any question that the bank is entitled to the relief you asked for." (Appendix, page 42)

(4) At page 53 of that transcript, Judge Stewart stated the following even before the hearing was concluded, "Well, I made a preliminary contract a few moments before I came on the bench with Norwest Bank Colorado." (Appendix, page 79)

(5) The Denver Probate Court on January 3, 1996, in an Order on Interpleader Petition satisfied a judgment of the Pueblo County District Court with four or five days after CNB filed an interpleader action in said Denver Probate Court on December 29, 1995. At a hearing without any evidence produced, the Denver Probate Court satisfied that judgment on January 3, 1996 (Appendix, pages 26-27).

(6) On December 21, 1995, defendant Merritts demanded that CNB take all appropriate action to seek an order of an appropriate court to deposit the funds that would otherwise be paid to Vento in an interest bearing account (Appendix, pages 94, 95). On January 3, 1996, a little over ten days after December 21, 1995, defendants did just that with an interpleader action in the Denver Probate Court.

(7) The Denver Probate Court issued an Order on Interpleader Petition on January 3, 1996 (Appendix, pages 26-27), within a matter of hours after service of process was made upon Vento (Appendix, pages 12, 13).

Though the common design is the essence of the charge, it is not necessary to prove that the defendants came together and actually agreed in terms, to have that design, and to pursue it by common means. If it is shown that the defendants pursued by their acts the same object, often by the same means, one performing one part and another part of the same, so as to complete it, with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object. *Regina v. Murphy*, 8 C. & P. 297, 310 (1837) (Cooleridge, J.). See *Pierce v. United States*, 252 US 239, 250 (1919).

The facts demonstrate that CNB, Stark and Merritts acted outside the confines of the normal judicial process . . . The allegations demonstrate willful participation in a joint activity to cause harm and injury to Vento which would justify characterization of these three defendants as state actors for purposes of §1983. . . . These three private defendants went beyond the mere use of the state court system in the course of an ordinary lawsuit. See *Crabtree v. Muchmore*, 904 F.2d 1475, 1482 (10th Cir. 1990). This is not a case where a private litigant and attorney merely brought suit and sought a judicial ruling. See *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1147 (1986). These defendants went beyond the concept that, "private use of state sanctioned private remedies or procedures does not give rise to the level of state action." See, e.g., *Flagg Brothers, Inc. v. Brooks*, 436 US 149, 98 S Ct 1729, 56 L.Ed 2d 185 (1978).

There is no apparent reason or legal liability or benefit to CNB that caused it to interplead the funds instead of paying off the judgments. Rule 22 of the Colorado

Rules of Procedure (Interpleader) provides in part that, "(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are [sic] such that the plaintiff is or may be exposed to double or multiple liability." There is nothing in the record to show that there were claims against CNB exposing it to double or multiple liability. CNB's arguments that there were claims against the judgments is meaningless.

Inasmuch as there was no basis for an interpleader action in this matter because there were not two or more claimants having claims against CNB the plaintiff, there had to be agreement and concerted action to accomplish what was done, i.e., for CNB to file an interpleader action on December 29, 1995, and have the Denver Probate Court to issue an Order on Interpleader Petition on January 3, 1996 (Appendix, pages 26-27).

The Complaint was sufficiently specific in alleging that the defendants conspired to do an unlawful act and set forth facts as to the acts performed by each defendant in furtherance of the conspiracy, facts as to overt acts in furtherance of the alleged conspiracy, and facts from which the court could have seen the damages that naturally would have resulted from the acts stated. See *Picking v. Pennsylvania R. Co.*, 5 F.R.D. 76 (1946).

2. The District Court Erred In Finding That Appellee C. Jean Stewart As The Denver Probate Judge Had Jurisdiction Over The Interpleader Action Hearing On January 3, 1996, In The Denver Probate Court In Case No. 95 PR 2379.

The District Court found that Judge Stewart did not act in the absence of all jurisdiction for the following reason, "Plaintiff fails to understand that the interpleader action was brought in the Denver Probate Court because the money owed as a result of the Pueblo District Court judgment belong to an express trust." (Appendix, page 116). This finding is clearly erroneous under the standard of review set forth in Rule 52(a) of Fed. R. Civ. P. The money owed as a result of the Pueblo County District Court judgment belongs to Plaintiff Vento and his sister as individuals. No money owed as a result of the Pueblo County District Court judgment belonged to an express trust.

There is no jurisdiction of the interpleader action in the Denver Probate Court under the Colorado Constitution or the Colorado statutes. The jurisdiction of the Denver Probate Court stems from Article VI Section 9(3) of the Colorado Constitution and C.R.S. §13-9-103; Said Section 9(3) of the Colorado Constitution provides as follows:

> (3) In the city and county of Denver, exclusive original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians, conservators and administrators, and settlement of their accounts, the adjudication of the mentally ill, and such other jurisdiction as may be provided by law

> shall be vested in a probate court, created by section 1 of this article, and to which court all of such jurisdiction of the county court of the city and county of Denver shall be transferred, including all pending cases and matters, effective on the second Tuesday of January, 1965.

The defendants attempt to give the Denver Probate Court jurisdiction in this matter by relying upon C.R.S. §13-9-103 as follows:

(1) The probate court of the City and County of Denver has original and exclusive jurisdiction in said city and county of:

XXXX

(5) The court has jurisdiction to determine every legal and equitable question arising out of or in connection with express trusts.

The action in interpleader in Case No. 95 PR 2379 in the Denver Probate Court has nothing to do with express trusts. It is an interpleader action only and all the parties are either individuals or corporations acting in their corporate capacity. Nor are there any legal or equitable questions arising out of or in connection with express trusts.

The Denver Probate Court is a court of limited jurisdiction and does not have jurisdiction over the interpleader action under Rule 22 of the Colorado Rules of Civil Procedure in Case No. 95 PR 2379. Subject matter jurisdiction concerns the Court's authority to deal with the class of cases in which it renders judgment and reference must be made to the nature of the claim and the relief sought. *Paine, Webber, Jackson and Curtis, Inc. v.*

Adams, 718 P.2d 508 (Colo. 1986); *In Re Marriage of Stroud*, 631 P.2d 168 (Colo. App. 1981). In Case No. 95 PR 2379 in the Denver Probate Court, the nature of the claim was one dealing with interpleader and the relief sought was interpleader and nothing else.

Nor did the Denver Probate Court have the power or authority to render the Order on Interpleader Petition on January 3, 1997, in Case No. 95 PR 2379 (Appendix, pages 26, 27).

Probate courts are courts of limited jurisdiction and have only that jurisdiction which is expressly given by statute, and neither the probate judge nor the probate court can have any greater authority than that conferred by statute. *Longshore v. City of Homewood*, 171 S.2d 453 (1965). A probate court is a court of limited authority and if it purports to act outside its statutory jurisdiction, its decrees are null and void. *In Re Milliman's Estate*, 406 P.2 873 (Ariz. App. 1965); *In Re Krystal*, 584 A.2d 672 (1991). Probate courts do not become courts of general jurisdiction just because an estate is involved. *Matter of Mahoney Trust*, 396 N.W.2d 494 (Mich. App. 1986); *In Re Kus*, 356 N.W.2d 23 (Mich. App. 1984). Illustration of a clear lack of subject matter jurisdiction would be a situation where a probate judge, with jurisdiction over wills and estates, would try a criminal case. The probate judge would not be immune from suit. *Dykes v. Hosemann*, 743 F.2d 1488, 1495 (1984). It cannot, without more, be taken as an authoritative abandonment of the long established doctrine in this jurisdiction that the modes of proceeding of the probate court make it an inappropriate forum for the resolution of conflicts over title to property, and one which is, in any event, not statutorily endowed with such

authority. *Anderson v. Pinkett*, 439 F.2d 619 (1971). The probate court is not the proper forum to enforce contractual rights. *Davis v. Adams*, 328 S.W.2d 851 (1965).

There is no jurisdiction under the Colorado Rules of Civil Procedure or the Colorado Rules of Probate Procedure for interpleader actions in the Denver Probate Court.

Rule 22(2) of the Colorado Rules of Civil Procedure provides in part, "In any civil action of interpleader, a *district court* (emphasis added) may enter its order. . . . Such *district court* (emphasis added) shall hear and determine the case. The whole of Rule 22 is as follows:

"Rule 22. Interpleader

(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross claim or counterclaim. The provisions of this Rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(2) In any civil action of interpleader, a district court may enter its order restraining all claimants from instituting or prosecuting any proceeding in any court of

this state affecting the property, instrument, or obligation involved in the interpleader action until further order of the court.

Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment."

No subject matter jurisdiction is given to the Denver Probate Court under Rule 22. Only district courts have jurisdiction over an interpleader action under Rule 22 of the Colorado Rules of Civil Procedure.

In his Recommendation the Magistrate Judge attempted to give jurisdiction to the Denver Probate Court by citing the following Rule (Appendix, page 106):

(a) Rule 1 of the Colorado Rules of Civil Procedure provides that, "These rules govern the procedure in the probate court for the City and County of Denver. . . . In case of conflict between these rules and the Colorado Rules of Civil Procedure. . . . , these rules shall control."

However, the Magistrate Judge overlooks Rule 82 of the Colorado Rules of Civil Procedure which provides that, "These rules shall not be construed to extend the jurisdiction of any court." Also, *People v. Kniss,* 144 Colo. 351, 357 P.2d 352 (1960) holds that the Colorado Supreme Court by rule cannot invest a court with expanded jurisdiction.

The Magistrate Judge is mistaken when at pages 106 and 107 of his Recommendation he states that, "Suffice it to say that at least a colorable argument can be made that Rule 1 of the Colorado Rules of Civil Procedure vests the

probate court with jurisdiction to pass on interpleader claims (Appendix, pages 106-107).

On December 29, 1995, jurisdiction over the matters involved in Case No. 95 PR 2379 in the Denver Probate Court still rested in the Colorado Court of Appeals or the Pueblo County District Court.

On December 29, 1995, the Appellee CNB filed a Complaint For Interpleader And Injunctive Relief in the Denver Probate Court, Case No. 95 PR 2379. Interpleaded was the amount of the judgments in the 1987 Action which judgments were granted to the Appellant Joseph A. Vento and his sister Cecilia De Fellippie individually by the Pueblo County District Court on June 23, 1993. These judgments were appealed to the Colorado Court of Appeals where they were affirmed and then to the Colorado Supreme Court where certiorari was denied on December 11, 1996. The Complaint also requested the Denver Probate Court to satisfy the judgments granted by the Pueblo County District Court on June 23, 1993, which it did on January 3, 1996. On January 3, 1996, the Denver Probate Court issued an Order on Interpleader Petition (Appendix, pages 26, 27).

On January 5, 1996, Mandate issued by the Colorado Court of Appeals affirming the judgments of June 15, 1993, of the Pueblo County District Court.

The date of December 29, 1995, when CNB filed its Complaint for Interpleader, was about seven days before the Colorado Court of Appeals issued its Mandate on January 5, 1996. Also, January 3, 1996, the date that the Denver Probate Court issued its Order on Interpleader Petition (Appendix, pages 26-27), was two days before

January 5, 1996, when the Mandate issued by the Colorado Court of Appeals. Therefore, at the time the Complaint was filed on December 29, 1995, and the Order on Interpleader Petition issued on January 3, 1996, jurisdiction of the judgments and the amounts of those judgments was in the Colorado Court of Appeals until January 5, 1996, when the Mandate issued. Jurisdiction of the judgments and the amounts of those judgments was not in the Denver Probate Court on December 29, 1995, and January 3, 1996, but either in the Colorado Court of Appeals or the Pueblo County District Court.

Also, the jurisdiction with respect to the Pueblo County District Court judgments remained at all times with the Pueblo County District Court except for appellate purposes and the Denver Probate Court never had nor got subject matter jurisdiction over these judgments and so acted with a complete absence of jurisdiction. "The mandate provided for in C.A.R. 41 (Rule 41 of the Colorado Appellate Rules) is intended to establish the finality of the judgment upon which the parties can rely and a direct attack upon the judgment after the mandate has issued as not contemplated by the appellate rules. *Garrett v. Garrett*, 30 Colo. App. 167, 490 P.2d 313 (1971). . . . In our view, the function of the mandate is to establish the finality of the court's judgment, . . . to restore jurisdiction in the tribunal from which the appeal or petition for review is taken, *People v. Jones*, 631 P.2d 1132 (Colo. 1981), and to communicate the court's judgment to that tribunal. *Hrabczuk v. John Lucas Landscaping*, 888 P.2d 367 (Colo. App. 1994).

Exclusive jurisdiction concerning the payment, collection and execution of such judgments lies with the

District Court of Pueblo County. "Once a court takes jurisdiction of an action, it thereafter has exclusive jurisdiction of the subject and matters ancillary thereto. *People in Interest of Maddox v. District Court*, 597 P.2d 573, 575 (Colo. 1979).

It is a general rule in Colordo [sic] that a court may not stay execution and thereby impair or destroy the statutory right of a creditor to enforce collection of its judgment against non-exempt property of the judgment debtor. *First National Bank of Denver v. District Court*, 652 P.2d 613, 616 (Colo. 1982).

Under normal appellate procedures a trial court loses its jurisdiction over a case as soon as an appeal is perfected in the appellate court. . . . Until the disposition of the appeal is announced, the trial court defers to the appellate court, but when the appellate court announces its decision to affirm, reverse, remand or modify, then under Colorado law the trial court is automatically reinvested with jurisdiction. . . . Upon regaining jurisdiction the trial court, through the use of its own enforcement procedures, is then responsible for execution of its own judgment in accordance with any directions issued by the appellate court. *Hylton v. Colo. Spgs.*, 32 Colo. App. 9, 505 P.2d 26 (1973).

Under the foregoing principles the trial court, the Pueblo County District Court, is automatically reinvested with jurisdiction for execution of its own judgment.

The jurisdiction of a court is continuing; once a court has acquired jurisdiction of a case, its jurisdiction continues until the court has done all that it can do to

exercise that jurisdiction to determine, subject to appellate review, all the issues involved, and to grant such complete relief as is within its jurisdictional powers to grant. *20 Am Jur. 2d Courts* §110.

On January 3, 1996, in Case No. 95 PR 2379, the Denver Probate Court did not have jurisdiction over the Defendant, Linda Saunders, Personal Representative of the Estate of Cecilia De Fellippie.

The Denver Probate Court issued its Order on Interpleader Petition when it did not have jurisdiction over the defendant, Linda Saunders, Personal Representative of the Estate of Cecilia De Fellippie because of a pending action in the District Court, Pueblo County, Colorado, *Linda Saunders, as Personal Representative for the Estate of Cecilia De Fellippie v. Joseph A. Vento and Wesley C. Kettelkamp, Jr.*, as set forth in paragraph 13 of the Complaint for Interpleader and Injunctive Relief.

The Denver Probate Court also recognized that it did not have such jurisdiction as shown at lines 10-14 on page 38 of Exhibit B to the Complaint herein which is the transcript of the hearing on January 3, 1996, as follows:

"The Court:. . . . And I realize I don't have jurisdiction over Mr. Littlepage (attorney for the Estate of Cecilia De Fellippie), but I am relying on a representation he made to me this morning that he will bring the action here and consolidate it with this case." (Appendix, page 65)

For the foregoing reasons, Judge Stewart was acting with a complete absence jurisdiction on January 3, 1996, in Case No. 95 PR 2379 in the Denver Probate Court.

3. The District Court Erred In Granting The Motions To Dismiss Without Considering That The Defendants Acted To Deprive The Appellant Vento Of His Property Without Due Process Of Law In The Interpleader Proceeding In The Denver Probate Court.

Vento has a cause of action under §1983 because he was deprived of property through state action without due process of law. See *Coleman v. Turpen*, 697 F.2d 1341, 1343 (10th Cir. 1983).

Substantive Due Process

The Due Process Clause of the Fourteenth Amendment provides that no state shall deprive any person of. . . . property without due process of law. The law of substantive due process prevents excessive government encroachment on fundamental rights and interests, and is intended to secure the individual from the arbitrary exercise of the powers of government. The Due Process Clause contains a substantive component that bars certain arbitrary, wrongful actions regardless of the fairness of the procedures used to implement them. The touchstone of due process is protection of the individual against arbitrary action of the government. *Daniels v. Williams*, 474 US at 441, 1065 Ct [sic] 662, 88 L. Ed 2d 662, 668, 672; *Zinermon v. Burch*, 498 US 113, 110 S Ct 975, 108 L.Ed 2d 100, 113 (1990).

The claim that a person is entitled to "substantive due process" means, as we understand the concept, that state action which deprives him of property must have a rational basis – that is to say, the reason for the deprivation may not be so inadequate that the judiciary will

characterize it as "arbitrary." No person shall be arbitrarily deprived of his property. The essence of substantive due process is protection from arbitrary and unreasonable action. A deprivation is arbitrary unless it is substantially justified. See *Jeffries v. Turkey Run Consolidated School District*, 492 F.2d 1, 3, 4 (1974).

The defendants acted without just cause and unreasonably and unexcusably under the circumstances in the interpleader action in the Denver Probate Court. There was no reason, legal or otherwise, for the defendants to start that interpleader action except to harass Vento and make it vexatious for him.

The defendants had deprived Vento of property without adequate justification. Vento was arbitrarily deprived of his property in an arbitrary and unreasonable manner. He was entitled to the protection of his property right from and against state interference without due process of law. The defendants had taken his property without providing constitutionally mandated procedures. There was no interest of the defendants to be protected by bringing the interpleader action. There were no substantive policy reasons for filing the interpleader action. The defendants were not proceeding under a claim of legal right. The filing of the interpleader action was arbitrary action.

Provisions in the Complaint showing lack of substantive due process are as follows:

(1) In paragraph 11 of the Complaint (Appendix, pages 12, 13) interpleader was ordered before Vento could file an answer or responsive pleading setting forth any defense he may have had to the interpleader action

or otherwise contest the interpleader complaint. A decree cannot be entered in an interpleader action until all of the defendants have had an opportunity to answer or contest the interpleader complaint. A decree cannot be entered in an interpleader action until all of the defendants have had an opportunity to answer or contest the interpleader complaint. *Faulkner v. American Casualty*, 584 A.2d 734, 748 (1991); *Westinghouse Electric Corp. v. United Elec. R. & M. Workers*, 99 F. Supp. 597 (1951).

(2) In paragraph 12 of the Complaint, Vento's lawyer appeared at that hearing at 10:30 a.m. on January 3, 1996, in the Denver Probate Court and requested a continuance but the request was denied (Appendix, page 13).

(3) In paragraph 13 of the Complaint it is alleged that the Denver Probate Court's Order on Interpleader Petition issued on January 3, 1996, satisfied Vento's judgment obtained against CNB on June 15, 1993, in the District Court in Pueblo County in Case No. 87 CV 867 Appendix, pages 26, 17 [sic]).

The interpleader action in the Denver Probate Court is in effect a taking of property when the government action – the Order on Interpleader Petition on January 3, 1996 – directly interferes with or substantially disturbed Vento's use and enjoyment of the property.

The fact of filing the interpleader action under the circumstances of this case together with the Denver Probate Court issuing the Order on Interpleader Petition deprived Vento of property without due process of law.

Procedural Due Process

The Fourteenth Amendment prohibits a state from depriving a person of liberty or property without due process of law. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. . . . An impartial tribunal is an essential element of a due process hearing. . . . A tribunal is not impartial if it is biased with respect to the factual issues to be decided at the hearing. . . . Due process also requires that one be given notice of the charges against him a reasonable time before the hearing is to take place. See *Miller v. City of Mission, Kan.*, 705 F.2d 368 (1983).

With respect to adequacy of notice is "notice reasonably calculated to reach all interested parties in time to afford them a reasonable opportunity to be heard:. . . . " (P)rovisions for a hearing satisfies due process only when notice is given which is reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane v. Central Hanover Bank and Trust Co.*, 339 US 396 (1950); *McKee v. Heggy*, 703 F.2d 479 (10th Cir. 1983).

The fundamental requirement of due process is the opportunity to be heard and it is an "opportunity which must be granted at a meaningful time and in a meaningful manner. *Parratt Taylor*, 451 US 527, 68 L.Ed 2d 420, 432, 101 S Ct 1908 (1981).

Provisions in the Complaint showing lack of procedural due process are as follows:

(1) In paragraph 10 it is alleged that the complaint, summons and motion to deposit money with the court were served by Vento at 7:45 a.m. on January 3, 1996, at his home in Pueblo, Colorado, which is about 100 miles from Denver, for a hearing at 10:30 a.m. on that same day of January 3, 1996, in Denver (Appendix, page 12).

(2) In paragraph 12 of the complaint it is alleged that Vento's attorney, Phillip Barber of Dufford & Brown, P.C., in Denver, requested a continuance at the inception of the hearing on January 3, 1996, which request for a continuance was summarily denied by the Denver Probate Court (Appendix, page 13).

(3) In paragraph 14 of the complaint it is alleged that Vento through is attorneys moved to disqualify Judge Stewart for a conflict of interest (Appendix, page 14). See also Exhibits C and D attached to the Complaint which are affidavits of attorneys about this matter (Appendix, pages 85-88 and pages 89-92). Thereafter Judge Steward [sic] signed a recusal order without vacating her previous Order on Interpleader Petition that she had granted on January 3, 1996.

CONCLUSION

The District Court's Order of June 4, 1998, should be reversed totally and Plaintiff Joseph A. Vento's Complaint reinstated and the defendants ordered to answer said Complaint.

Respectfully submitted this 16th day of October, 1998.

/s/ Joseph A. Vento
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